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the Federal Communications Commission of
the United States**

VOLUME 92 (2d Series)

Pages 1 to 234

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This is the last pamphlet in Volume 92 2d Series.

INDEX

Page

Absolutely Great Radio, Inc.; re Review Board reverses ALJ's grant and awards it to competing applicant, BC Docket No. 80–366, (FCC 83R–9) . 1

Absolutely Great Radio, Inc.; re Application for construction permit for new FM station, BC Docket No. 80–366, (FCC 82D–15) 13

AT&T Co.; re Petitions filed for waiver of Computer II rules granted, Section 64.702, (FCC 82–580) 37

AT&T Co.; re Ordered to offer certain channels to other common carriers and the public, Docket No. 21499, (FCC 83–39) 45

David Hildebrand; re Review Board declined to revoke Amateur license or suspend operator license, PR Docket No. 81–302, (FCC 83R–6) 69

David Hildebrand; re Petitioners filed for revocation and suspension of Amateur license, PR Docket No. 81–302, (FCC 82D–68) 73

Faith Center, Inc.; re Review Board denied appeal from ALJ's ruling dismissing application, BC Docket No. 82–212, (FCC 83R–3) 83

Lyman S. Cox, Jr.; re Review Board reinstated application and remanded case for comparative hearing, PR Docket No. 82–545, (FCC 83R–4) 90

Mobile Telephone, Inc.; re Review Board affirmed ALJ's grant, CC Docket No. 81–67, (FCC 83R–7) 95

Mobile Telephone, Inc.; re Application granted for additional location of two-way station to operate on presently authorized channels, CC Docket No. 81–67, (FCC 83R–48) 101

North Carolina Radio Service, Inc.; re Initial decision in reference to FCC 82R–67, printed at 92 FCC 2d 621, BC Docket No. 81–244, (FCC 82D–38) 110

Pappas Telecasting, Inc.; re Review Board granted request for waiver of Section 73.685(b), BC Docket No. 81–494, (FCC 83R–1) 116

Pappas Telecasting, Inc..; re Applications for construction permits for changes in television facilities, Docket No. 81–494, (FCC 82D–51) 122

Peoples Broadcasting Corp.; re Review Board affirmed Initial Decision for broadcast construction permit, BC Docket No. 78–243, (FCC 83R–5) 131

Peoples Boardcasting Corp.; re Application for construction permit for new FM broadcast station, BC Docket No. 78–243, (FCC 82D–39) 158

Puerto Rico Communications Authority; re *Memorandum Opinion and Order* adopted, Section 214, (FCC 83–28) 261

Puerto Rico Telephone Co.; re *Memorandum Opinion and Order* adopted, (FCC 83–27) 273

Puerto Rico Telephone Co.; re *Memorandum Opinion and Order* adopted, (FCC 83–29) 291

RKO General, Inc.; re Commission found proposal of commercial VHF licensee sufficient, proceeding terminated, Docket No. 19991, (FCC 82–559) 303

Roanoke Christian B/cing, Inc.; re Review Board affirmed Initial Decision, BC Docket No. 81–46, (FCC 83R–8) 307

Roanoke Christian B/cing, Inc.; re Application for construction permit, BC Docket No. 81–46, (FCC 82D–46) 313

Transnational Network, Inc.; re Application for review of *Memorandum Opinion and Order* denied, (FCC 82–538) 324

Subject Digest

Alien, Ownership

In hearing matter of mutually exclusive CP applications for FM station, Review Board reverses ALJ's grant and awards it to a competing applicant. The Board affirmed ALJ's conclusion that permissible integrated alien ownership should be credited but reversed his finding that applicant was entitled to 50% integration credit. *–Absolutely Great Radio, Inc.* BC Docket No. 80–366

Amateur Operator

Review Board declined to revoke Amateur license or suspend operator license for use of indecent language. Commission has defined and proscribed indecent matter only in certain broadcast contexts and the Board is not empowered to extend this policy to non-broadcast services. *–David Hildebrand* PR Docket No. 81–302

Amateur Radio Service

(See: Amateur Operator-*David Hidebrand*)

Application, Dismissal of

Where an ALJ dismisses an application for failure to prosecute solely because of a late exchange of hearing exhibits that occurred at least 26 days before the scheduled hearing date, the Review Board reinstates the application and remands the case for a full comparative hearing. *–Lyman S. Cox, Jr.* PR Docket No. 82–545

Character Qualifications

Review Board affirms Initial Decision that awarded integration credit for directors of a nonprofit, non-stock corporation who will participate in station management, and declined to grant any integration ownership credit based on an unexercised option agreement. Board also declined to add character issue and affirmed the ALJ's grant of summary decision on financial qualifications issue. *–Roanoke Christian B/cing, Inc.* BC Docket No. 81–46

Character Qualifications, Lack of Candor

Review Board affirmed Initial Decision, granted FM broadcast construction permit, allowed substitution for deceased integrated owner, and gave substantial comparative demerit for a principal's participation in 18 U.S.C. §610 violation in *Star Stations* proceeding and his lack of candor at hearing. Stock subscription, but not option agreement, is recognized for integration credit. *–Peoples Broadcasting Corp.* BC Docket No. 78–243

Circuits Voice

Memorandum Opinion and Order adopted authorizing the Puerto Rico Telephone Company (PRTC) to provide telephone service between Puerto Rico and Canada via the U.S. mainland. *–Puerto Rico Telephone Co.*

Common Carrier, Computer II

Petitions filed for waiver of Computer II rules granted so that telephone companies could tariff specialized CPE needed by disabled persons to communicate. The separate subsidiary requirement was waived so that the BOCs could provide specialized CPE for the disabled on an unseparated basis for one year. –*AT&T Co.*

Common Carrier, Foreign

Memorandum Opinion and Order adopted certifying the Puerto Rico Telephone Company (PRTC) as an interstate and foreign carrier authorized to provide telephone service between Puerto Rico and points in and reached via the U.S. mainland and between Puerto Rico and the Virgin Islands. –*Puerto Rico Telephone Co.*

(See also: Circuits Voice-*Puerto Rico Telephone Co.*)

Common Carrier, Interconnection, Customer-Provided Equipment

AT&T directed to file tariffs making group (48kHz) and supergroup (240kHz) channels available to other common carriers and the public under a general rate schedule. Further comments requested re: feasibility of using existing facilities for local distribution portion of channels and whether transmission components can be used for wideband services. –*AT&T Co.* Docket No. 21499

Common Carrier, Interconnection, Duty to Interconnect

(See: Common Carrier, Foreign-*Puero Rico Telephone Co.*)

Common Carrier, International

(See: Common Carrier, Foreign-*Puerto Rico Telephone Co.*)

(See also: Circuits Voice-*Puerto Rico Telephone Co.*)

Common Carrier, Interstate

Memorandum Opinion and Order adopted authorizing the Puerto Rico Communications Authority to provide communication services between Puerto Rico and the U.S. mainland. –*Puerto Rico Communications Authority*

(See also: Common Carrier, Foreign-*Puerto Rico Telephone Co.*)

(See also: Circuits Voice-*Puerto Rico Telephone Co.*)

Common Carrier, Leased channel service

(See: Common Carrier, Foreign-*Puerto Rico Telephone Co.*)

Common Carrier, Like Services

(See: Common Carrier, Interconnection, Customer-Provided Equipment-*AT&T Co.*)

Common Carrier, Resale Carrier

Application for review of *Memorandum Opinion and Order* imposing forfeiture for willful refusal to answer Commission inquiries regarding service complaints denied for failure to support claim of inability to pay. Forfeiture reduced *sua sponte*, where evidence shows carrier has filed bankruptcy petition. –*Transnational Network, Inc.*

Common Carrier, Service, Duty to Furnish
(See: Common Carrier, Interconnection, Customer-Provided Equipment-*AT&T Co.*)

Comparative Hearing
(See: Character Qualifications, Lack of Candor-*Peoples Broadcasting Corp.*)

Coverage, Principal city
Where an applicant for major changes in its television facilities would fail to provide a city-grade signal over only 2.9% of its community of license, has made good faith efforts to locate a suitable alternative transmitter site, and proposes to put a station back on the air, the Review Board granted the requested waiver of Section 73.685(b) and authorized the changes. -*Pappas Telecasting, Inc.* BC Docket No. 81–494

Deregulation
(See: Common Carrier, Computer II-*AT&T Co.*)

Disabled Persons, Customer Premises Equipment
(See: Common Carrier, Computer II-*AT&T Co.*)

Domestic Public Land Mobile Radio Service, Need for
In hearing matter of application for additional location to reuse six presently authorized DPLMRS UHF channels, Review Board affirmed ALJ's grant. Applicant demonstrated need for its proposal. ALJ did not err in failing to make findings on an alternative engineering proposal submitted by a competitor since the evidence was not germane to the designated issue. -*Mobile Telephone, Inc.* CC Docket No. 81–67

Evidence, Presumptions
(See: Character Qualifications, Lack of Candor-*Peoples Broadcasting Corp.*)

Failure to Prosecute
Review Board denied appeal from ALJ's ruling dismissing application where applicant declined to participate in proper discovery procedures. Board also declined to disqualify itself. -*Faith Center, Inc.* BC Docket No. 82–212

(See also: Application, Dismissal of-*Lyman S. Cox, Jr.*)

Financial Qualifications
(See: Character Qualifications-*Roanoke Christian B/cing, Inc.*)

FM Station, Authorization
(See: Character Qualifications, Lack of Candor-*Peoples Broadcasting Corp.*)

Forfeiture, Common Carrier Violation
(See: Common Carrier, Resale carrier-*Transnational Network. Inc.*)

Initial Decision
This initial decision is in reference to Commission's decision in this docket that is printed at 92 FCC 2d 621. -*North Carolina Radio Service, Inc.* BC Docket No. 81–244

License Revocation
(See: Amateur Operator-*David Hildebrand*)

Mailgram
(See: Common Carrier, Interstate-*Puerto Rico Communications Authority*)

Minority Ownership, Factor in Comparative Proceeding
(See: Alien, Ownership-*Absolutely Great Radio, Inc.*)

Nonprofit Organization
(See: Character Qualifications-*Roanoke Christian Broadcasting, Inc.*)

Option
(See: Character Qualifications-*Roanoke Christian Broadcasting, Inc.*)

Ownership and Management, Integration of
(See: Alien, Ownership-*Absolutely Great Radio, Inc.*)
(See also: Character Qualifications, Lack of Candor-*Peoples Broadcasting Corp.*)
(See also: Character Qualifications-*Roanoke Christian Broadcasting, Inc.*)

Remand
(See: Application, Dismissal of-*Lyman S. Cox, Jr.*)

Review by Review Board
(See: Character Qualifications, Lack of Candor-*Peoples Broadcasting Corp.*)

Service, Need for
(See: Common Carrier, Interconnection, Customer-Provided Equipment-*AT&T Co.*)

Service, Satisfactory
Commission found proposal of commercial VHF licensee—to establish a fully staffed office/studio facility in New Jersey, and to promote those facilities-sufficient to satisfy the special New Jersey service obligation imposed upon it. Proceeding terminated. -*RKO General, Inc.* Docket No. 19991

Service, Secondary
(See: Service, Satisfactory-*RKO General*)

Shadowing
(See: Coverage, Principal city-*Pappas Telecasting, Incorporated*)

Site Availability
(See: Coverage, Principal city-*Pappas Telecasting, Incorporated*)

Subsidiary, Separate
(See: Common Carrier, Computer II-*AT&T Co.*)

Tariff
(See: Common Carrier, Interconnection, Customer-Provided Equipment-*AT&T Co.*)

Telegraph Service
(See: Common Carrier, Interstate-*Puerto Rico Communications Authority*)

Telephone Companies, Competition
(See: Common Carrier, Foreign-*Puerto Rico Telephone Co.*)

Voice grade channel
(See: Common Carrier, Interconnection, Customer-Provided Equipment-*AT&T Co.*)

Waiver
(See: Coverage, Principal city-*Pappas Telecasting, Incorporated*)

Alien, Ownership
Minority Ownership, Factor in Comparative Proceeding
Ownership and Management, Integration of

In hearing matter of mutually exclusive CP applications for FM station, Review Board reverses ALJ's grant and awards it to a competing applicant. The Board affirmed ALJ's conclusion that permissible integrated alien ownership should be credited but reversed his finding that applicant was entitled to 50% integration credit.
–*Absolutely Great Radio, Inc.*
BC Docket No. 80–366

FCC 83R–9

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Applications of	
ABSOLUTELY GREAT RADIO, INC. Ventura, California	BC Docket No. 80–366 File No. BPH–11145
VENTURA BROADCASTING CO. Ventura, California	BC Docket No. 80–367 File No. BPH–781129AH
WILLIAM SHEARER AND ARIKE LOGAN-SHEARER, JOINT TENANTS Ventura, California	BC Docket No. 80–368 File No. BPH–790323AC
For Construction Permit for a New FM Station	

Appearances

B. Jay Baraff, Aaron Shainis and *Lee J. Peltzman* on behalf of Absolutely Great Radio, Inc.; *Martin R. Leader, Clifford M. Harrington* and *David D. Oxenford* on behalf of Ventura Broadcasting Co.; *Harry P Warner* and *James L. Winston* on behalf of William Shearer and Arike Logan-Shearer, Joint Tenants, and *Charles W. Kelley* and *Joseph A. Belisle* on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

DECISION

(Adopted: January 31, 1983; Released: February 4, 1983)

BOARD MEMBER BLUMENTHAL FOR THE REVIEW BOARD:

1. This proceeding involves the mutually exclusive applications of Absolutely Great Radio, Inc. (Absolutely Great), Ventura Broadcasting Co. (Ventura) and William Shearer and Arike Logan-Shearer, Joint Tenants (Shearer) for authority to construct a new FM broadcast station (Channel 296) at Ventura, California. These applications, along with four others that were subsequently dismissed with prejudice, were designated for hearing on various issues, the only one of which remains is the standard comparative issue. Hearing Designation Order, Mimeo No. 34130, released July 31, 1980.

2. In an Initial Decision, FCC 82D–15, released March 12, 1982, ALJ Chachkin granted Absolutely Great's application basing his decision on the integration criterion. Absolutely Great and Ventura were found to be equal on full-time quantitative integration credit (*i.e.*, 100%) and far superior to Shearer, which was credited with 50% full-time and 50% part-time quantitative integration, with Absolutely Great receiving an overall preference because of the qualitative attributes of its integration proposal.

3. This proceeding is now before the Review Board on exceptions filed by Ventura and Shearer and limited exceptions filed by Absolutely Great. Replies to the exceptions were filed by all of the parties. The Board has reviewed the Initial Decision (*I.D.*) in light of the exceptions and briefs, the oral argument held October 29, 1982, and our examination of the record. We adopt the ALJ's findings of fact, except as modified in this Decision, but we reverse certain of his conclusions, particularly his treatment of Shearer's integration proposal, and conclude that a grant of Shearer's application would best serve the public interest, convenience, and necessity.

Integration

4. Mr. and Dr. Shearer are joint tenants in the applicant entity, each, thus, having a 50% undivided interest in the whole. *I.D.*, para. 51. Mr. Shearer will work full time at the station as its general manager and its sales manager;[1] Dr. Shearer, a practicing physician with numerous other business interests, says that she would assist part time at the station. *Id.*, paras. 53–58. The Initial Decision treats the Shearers' respective ownership interests as if they were entirely discrete and accords a 50% full-time integration credit for Mr. Shearer's participation and a 50% part-time credit for Mrs. Shearer's participation. *I.D.*, Conclusions, para. 13.

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[1] Mr. Shearer, since 1968, has had distinguished and extensive experience in broadcasting. *I.D.*, para. 54.

5. Shearer excepts to this separate apportionment of the joint ownership integration credit and, citing California law,[2] *East St. Louis Broadcasting Co., Inc.*, 19 FCC 2d 300 (ALJ 1969); *Bie Broadcasting Co.*, 81 FCC 2d 40, rev'd on other grounds, 81 FCC 2d 1 (Rev. Bd. 1980); *New Continental Broadcasting Co.*, 88 FCC 2d 830 (Rev. Bd. 1981), *reconsideration denied*, 89 FCC 2d 631 (1982), urges that the joint Shearer interest is entitled to a 100% full-time integration credit because their marital unity-of-interest is a basis for attributing the ownership interest of one spouse to the other.

6. The Initial Decision notes (Conclusions, para. 12), not entirely incorrectly, that in both *East St. Louis* and *Bie, supra*, attribution of one spouse's legal ownership interest to the other for purposes of integration credit was accompanied by parol claims that one of the spouses with a joint ownership interest would remain submissive insofar as station management.[3] The same result obtained in *New Continental, supra*: one spouse's joint ownership interest was combined with and credited to the integrated spouse even though the integrated spouse had no indicia of legal voting control over the copartner's ownership interest.[4] In the instant case, however, no interspousal attribution was permitted because one spouse, Dr. Shearer, indicated a part-time rather than a wholly passive role at the proposed station.

7. The question of how to treat spousal interests in a communications property has been a slightly troubling one. In a recent Commission decision, *Alexander S. Klein, Jr.*,[5] the separate media interests of a husband and wife were considered commonly because of the inescapable fact that spousal partners generally have a "clear community of interest." 86 FCC 2d at 426. In light of the key rationale underlying the spousal attribution doctrine in *Klein, i.e.*, the Commission's refusal to attempt to distinguish between common media interests owned by spouses, we asked the parties to this case to specially brief the issue.[6] Ventura and Absolutely Great both insist that *Klein* is inapposite because the attribution of separate spousal interests there was for purposes of diversification, not

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[2] Shearer cites California Civil Code §683 and a state case, *Rupp* v. *Kahn*, 246 CA 2d 188 (1966), for the proposition that although each joint tenant has an "undivided one-half interest" in the entity, each interest—being "undivided"—runs to the entire property. *Shearer Exceptions and Brief*, at pp. 6–7.

[3] *See*, respectively, 19 FCC 2d at 346–348; 81 FCC 2d at 103.

[4] *See* 88 FCC 2d at 838

[5] 86 FCC 2d 423, 425–427 (1981), *aff'g* 69 FCC 2d 2134 (Rev. Bd. 1978).

[6] Review Board Letter of December 8, 1982; supplemental briefs were filed on December 22, 1982, and January 7, 1983. Earlier, the proceeding was held in abeyance for 49 days at the request of the parties while they attempted unsuccessfully to settle the case. Several letters were submitted to the Board setting forth the parties' claims about why the case could not be settled. The letters will be stricken because of the public policy favoring confidentiality of discussions in order to encourage negotiations and settlements. *See Horne Industries, Inc.*, 52 RR 2d 1009 (Rev. Bd. 1982).

integration. These parties contend that the goals of integration and diversification are different under the *Policy Statement*[7] and that, in essence, the credit for ownership integration is a personal one based upon an owner's day-to-day participation at the station. Hence, it is contended, integration credit should be limited exclusively to a *pro rata* ownership interest.

8. Although we can accept that view of integration as a general matter, we also believe that it misses the basic point in *Klein* and runs counter to the precedents of *East St. Louis*, *Bie*, and *New Continental*. First, the point in *Klein* is that it is mostly artificial and unproductive to attempt to parse a going marital relationship into individual media interests. Because of the "clear community of interest" between ordinary marital partners, the fortunes of one marital partner usually impact the other.[8] Their interests, in the main, are common and not separate. Second, *East St. Louis*, *Bie*, and *New Continental* do not hold integration credit to a proportion of personal ownership. Rather, recognizing the unique nature of the marital relationship and joint property ownership by the married partners, these cases specifically permitted the vicarious attribution of spousal interests. Ergo, even for integration purposes, joint spousal interests have been treated as far back as 1969 quite differently than under the conventional rule whereby the integration credit of non-married owners coincides with the level of personal voting control. *See, e.g., Merrimack Valley Broadcasting, Inc.*, FCC 82R-71, released December 8, 1982; *Central Texas Broadcasting Co., Ltd.*, 90 FCC 2d 583 (Rev. Bd. 1982). In short, attribution of mutual interspousal interests for purposes of vicarious integration credit is a well-rooted concept in our comparative processes as a rational exception to the conventional rule.

9. All that seems to distinguish the instant Shearer application from the aforesaid precedents permitting vicarious integration credit based upon interspousal attribution of co-ownership interests is the fact one of the spouses here does not verbally pledge to remain inactive but proposes instead to work part time. Consequently, the Shearer application did not receive *additional* credit because *both*

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[7] *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965).

[8] *Klein* is certainly not *sui generis* in the law in recognizing the unique nature of the marital relationship and refusing to differentiate between spousal interests. *See, e.g.*, 18 U.S.C. §208, the U.S. Criminal Code "conflicts of interest" law, making it illegal for a federal employee to act on a matter in which the employee *or spouse* — without distinction—has a financial interest. Community property laws are conspicuously based on the premise of an undifferentiated "community of interest" in property owned by husband and/or wife. Indeed, the marital relationship and the incidents thereto consitute an entire body of indigenous law. That is not to say that the law does not recognize the right of marital partners to own property separately. However, as in *Klein*, the law will frequently pierce the bridal veil and consider the interest of one spouse the interest of both.

spouses intend to work but conversely, the integration credit was actually diminished from 100% to 50% simply because one spouse did not avow dormancy. This diminution is rather asynchronous with the *Policy Statement* goal of encouraging active ownership participation in management; and, indeed, under the principle applied here, Shearer apparently would have received twice the full-time integration credit awarded (100% v. 50%) if one of the spouses had merely made a self-serving promise never to set foot in the station or to inquire into business or policy judgments. This is a perverse dynamic and does not harmonize well with the real goal of the *Policy Statement's* premium on ownership participation. We do not particularly fault the ALJ for this result because, to be sure, the allowance of vicarious integration credit in prior cases involving married co-owners was in each instance attended by language apparently relying on an anticipatory parol pledge that one joint spousal owner would submit unequivocally to the will of the other in station management matters. Nevertheless, and in retrospect, we find such parol pledges of future obsequiousness to be decisionally worthless and refuse to see vicarious integration credit hang on so bare a thread.[9] Not only are such pledges easily rigged and impossible to police, permitting litigation over the question of whether one spouse is likely to be submissive or aggressive, deferential or assertive, dependent or independent is a spectre from which we recoil. While the evidentiary submissions on the potential passivity, *vel non*, of one spouse would be certainly colorful, we doubt that they would be meaningful and it is probably no historical accident that in every case cited above where one spouse sought vicarious integration credit for the marital partner's interest in the proposed station, it was granted.[10] Comparative hearings are sufficiently lengthy and complex without encouraging "passivity" issues surrounding connubial relations. Because we find any such verbal promises of future passivity as between spouses to be of virtually no probative value, we have but two choices: (1) to treat the joint equity interests of marital partners in the same manner with any other applicant and to disallow any vicarious integration credit (absent a formal voting proxy); or (2) to regard joint spousal interests as "unity-of-interest" and to accept the notion of vicarious integration credit in the marital context. Of the two choices, and in consideration of long-standing precedent which carves out a general exception in the case of married couples, we opt for the latter as much more closely proximating the reality on which adjudication should be based.

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[9] The Commission came to the same conclusion in *Klein*: "We do not accept a disclaimer of active interest or participation in a commonly owned entity. . . ." 86 FCC 2d at 426. Likewise, we find that the verbal pledge of one spouse to defer categorically to the other to be curiously reminiscent of the traditional marital oath to "love, honor, and *obey*." While quaint, the latter vow hardly replicates contemporary culture.

[10] Much has been made in this case of the fact that Mrs. Shearer is a doctor, that she owns real estate, and that she says she will share in the decision-making. None of this, we believe, summons the necessity of treating Mr. and Dr. Shearer in a manner as if they were arms-length shareholders in a large corporate entity. Indeed, even if we were inclined to base vicarious integration credit on one spouse's pledge to be deferential, the Shearers would probably be credited in any event since it is fairly clear from the record that Mr. Shearer will effectively manage the station. Not only does he have extensive radio management experience (*I.D.*, para. 54) while she has none (Tr. 1051), they both testified that Dr. Shearer would be working under Mr. Shearer's "supervision." *See* Tr. 1014, 1051

10. Here, and in the future then, we will follow the commonsense policy instruction of *Klein* and not generally vex to differentiate between common spousal ownership interests.[11] Nor need married co-applicants make evidentiary showings that one is spouse-like or mouse-like. We will assume that the integrated spouse is acting on behalf of the marital entity, *i.e.*, a common party-in-interest, and will attribute one spouse's ownership share to the co-owner.[12] And, as in *Klein*, we hasten to add that this attribution is sexually neutral. In this case, we will treat the Shearer applicant for what it actually is stripped of the formalisms requisite for business purposes: a simple, wholly-owned "Mom and Pop" entity in which both will be participating at the station and we will not diminish their 100% integration credit solely because "Mom" (in this case) will also lend a part-time hand. Inasmuch as Shearer is awarded 100% full-time credit based on the attribution of one spouse's 50% interest to the full-time co-owner, no extra part-time credit is awarded, the full 100% interest having been exhausted.[13]

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[11] Ventura asserts that *East St. Louis, Bie,* and *New Continental* are distinguishable because in those cases the equity was a joint stock ownership rather than a direct ownership interest in the applicant. Ventura Reply, at p. 8 n.3. However, it is clear here that, unless the property is partitioned, the Shearer joint tenants have an indivisible ownership in the subject entity. There is no voting control in a joint tenancy. *Id.* Nor is there in a marriage.

[12] *See* 86 FCC 2d at 427. Moreover, the reasonable policy assumption of a marital unity-of-interest invoked by the Commission in *Klein* and followed here by the Board is not impermissible. Indeed, apart from the fact that the credit for "integration" itself is predicted on a reasonable assumption, the Commission (and the Board) have been rebuked by the court for demanding evidentiary proof in the integration sphere where a common-sense, "reasonable expectation" is sufficient. *Cf. TV 9, Inc.* v. *FCC*, 495 F.2d 929, 937–38 (D.C. Cir. 1973) (Commission may assume that integrated minority ownership promotes public interest). The Commission's assumption of a marital unity-of-interest is also a "reasonable expectation."

[13] The ALJ in *East St. Louis* summed it up perfectly:

> Full-time employment in the day-to-day operation of a station on the part of either spouse sharing a joint interest is a beneficial with respect to integration as the service of an individual holding an identical but undivided interest. Of course, no *extra credit* can be awarded where both spouses having a joint interest participate full time or where one of them is employed full time and the other also participates but on a part-time basis. [19 FCC 2d at 346 (emphasis

11. The quantitative percentages of integration credit accorded Absolutely Great and Ventura by the ALJ are also challenged in the exceptions. Absolutely Great is a corporation comprised of three stockholders, all of whom propose to work full time in management positions with the new facility. James Sylvester, a 51% shareholder, will serve as general manager, sales manager, and chief engineer; Donna Sylvester, his wife and 33.5% shareholder, will work as the programming-news director; and Dora Luz Lara, a 15.5% shareholder, is proposed as the station's director of public and minority affairs and as assistant program director. Mrs. Lara is not a United States citizen. *I.D.*, Findings, paras. 3, 4, 36, and 39. Ventura is a corporation with two stockholders, both of whom propose to devote full time to managerial roles. Michael R. Thomas, an 85% shareholder, will be the general manager of the proposed station and Edward Dela Pena, a 15% shareholder, will serve as the station's chief engineer. *I.D.*, Findings, paras. 42, 43, and 46. The Initial Decision accords 100% full-time integration credit to both applicants. Ventura charges in its exceptions that Absolutely Great is not entitled to integration credit for Mrs. Lara's participation at the proposed station because she is an alien. For its part, Shearer would have us impose a demerit against Absolutely Great because of Mrs. Lara's alien status. Additionally, Shearer questions whether the positions of Mrs. Lara and Mrs. Sylvester of Absolutely Great, and Mr. Dela Pena of Ventura, are managerial in nature and argues that neither applicant merits any integration credit for these individuals.

12. The contentions that Mrs. Lara's alien status precludes Absolutely Great from receiving integration credit or warrants a demerit are without merit. As the ALJ correctly points out, Section 310(b)(3) of the Communications Act, which prohibits the grant of a broadcast station license to a corporation of which any officer or director is a alien or in which more than one-fifth of the capital stock is owned by aliens, is designed to guard against alien control and not the mere possibility of alien control. *James A. Noe* v. *F.C.C.*, 260 F.2d 739 (D.C. Cir. 1958). In this case, Mrs. Lara owns less than twenty percent of the applicant's stock and is neither an officer or director of the corporation, thus, her participation comports with the statute. Furthermore, it is an overstatement to suggest, as Ventura does, that Congress intended under Section 310 for the Commission to discourage all alien participation in broadcast facilities. In fact the overall statutory scheme further protects against any potential

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added).]

On the other hand, where only one spouse has an ownership interest, as in *Ottumwa Broadcasting Co.*, FCC 82R-78, released December 27, 1982 (Rev. Bd.), we will not attribute that interest to a spouse who is a non-owner. *See id.*, at para. 7. By the same token, we will not attribute one spouse's joint ownership interest to the other where the parties are separated or divorced because the presumption of a "unity" or a "community of interest" obviously does not obtain.

foreign threat in terms of the control of broadcast media by providing that the President of the United States has authority to seize all radio stations in case of war or threat of war. Section 606 of the Communications Act. Additionally, we note that the Commission has never articulated a xenophobic doctrine or held in any case that the limited permissible alien participation at broadcast stations should be penalized or treated differently from citizen participation. Absolutely Great's proposal not only complies fully with the provisions of the Act but also serves the Commission's objective of encouraging owners to participate full time in the day-to-day operations of their stations. *See Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d at 395. We affirm the ALJ's determination that Mrs. Lara's alien status is not a basis for reducing Absolutely Great's quantitative integration credit.[14]

13. Additionally, Shearer's exceptions that Mrs. Lara, Mrs. Sylvester, and Mr. Dela Pena will not serve as managerial employees are denied. The contentions raised concerning Mrs. Lara and Mrs. Sylvester are essentially the same as those that were adequately considered and correctly rejected by the ALJ. *I.D.*, Conclusions, para. 3. As the station's public and minority affairs director and assistant program director, Mrs. Lara will act as liaison between the station and the various minority groups within the community to insure that its needs and interests are known and represented in the station's programming and will have the responsibility of developing specific programs to deal with these concerns. Absolutely Great Exh. 7, pp. 1 and 2. Additionally, as programming news director, Mrs. Sylvester will oversee and coordinate all programming, news, public affairs, public service and other programming on the proposed station. Absolutely Great Exh. 6, p. 1. Thus, the evidence establishes that both will serve in responsible managerial positions at the station. Similarly, we concur with the ALJ that the record evidence demonstrates that Mr. Dela Pena will serve full-time as chief engineer of the station, a position that is entitled to integration credit. *See Grand Broadcasting Co.*, 36 FCC 925, 930 (1964); *East St. Louis Broadcasting Co., Inc., supra*, 19 FCC 2d at 297. Both Absolutely Great and Ventura will be credited with full-time participation of 100% of their owners in management of the station.

14. The ALJ evaluated only the Absolutely Great and Ventura qualitative enhancements in order to determine which applicant deserved the overall integration preference. Since we have concluded that Shearer is also entitled to 100% full-time integration credit, we shall enlarge upon the ALJ's analysis to evaluate the qualitative enhancements of all three applicants. Those attributes are as

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[14] In view of the discussion in the text, we need not and do not reach the question raised by the Mass Media Bureau and Absolutely Great of whether denying integration credit because of Mrs. Lara's alien status would be unconstitutional.

follows: (a) local residence—Ventura, 85%, for Mr. Thomas; Absolutely Great, 84.5% for Mr. and Mrs. Sylvester; and Shearer, 0%. Mr. Dela Pena of Ventura and Mrs. Lara of Absolutely Great plan to commute to the station.[15] Mr. Shearer plans to move to Ventura but now lives outside the station's proposed service area. Only Ventura's Mrs. Sylvester is more than minimally civically active; (b) broadcast experience—Ventura, 100%, for Messrs. Thomas and Dela Pena; Shearer, 100%; and Absolutely Great, 84.5%, for Mr. and Mrs. Sylvester. Messrs. Thomas, Dela Pena, Shearer, and Sylvester have extensive experience while Mrs. Sylvester has somewhat less but still considerable experience; (c) minority—Shearer, 100%, for Mr. Shearer, who is Black; Absolutely Great, 15.5%, for Mrs. Lara, who is Hispanic; and Ventura, 15%, for Mr. Dela Pena, who is Hispanic; (d) female—Absolutely Great, 49%, for Mrs. Sylvester and Mrs. Lara. The ALJ awarded slight enhancement credits to Ventura over Absolutely Great for local residence and broadcast experience because Mr. Thomas had lived longer in Ventura and Ventura County than Mr. and Mrs. Sylvester and Ventura had a greater percentage of its ownership with broadcast experience. He concluded, however, that these credits were outweighed by the female ownership of Absolutely Great and the greater relative importance of Mrs. Lara's position as public and minority affairs director *vis-a-vis* Mr. Dela Pena's role as chief engineer. Although Shearer was effectively eliminated from the final comparative evaluation because of the ALJ's finding that it was entitled to only 50% full-time quantitative integration credit, the ALJ noted that Shearer's proposal was also qualitatively inferior to those of Absolutely Great and Ventura because of the local residence of the principals of the latter two applicants. In support, the ALJ cited *Waters Broadcasting Corp.*, 88 FCC 2d 1204 (Rev. Bd. 1981), where the Board held that an applicant with substantial enhancement credit for 100% local residence and civic activities and some enhancement for female ownership was to be preferred over one with slight enhancement for residence in the service area and substantial enhancement for 100% minority and female ownership.

15. On December 1, 1982, subsequent to the issuance of the Initial Decision, the Commission reversed the Board's Decision in *Waters Broadcasting Corp., supra. See* FCC 82-483, released December 1, 1982. It held that *Waters* should have received moderate enhancement credit for residence within the service area and agreed with the Board that the 100% integrated minority applicant warranted substantial enhancement credit. While the Commission explicitly declined to evaluate the relative weight that should be

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[15] Mrs. Lara's statement that she might move to Ventura (*i.e.*, "if it is needed, maybe in the near future. You never know," Tr. 875) is not sufficiently certain to entitle Absolutely Great to local residence enhancement credit for Mrs. Lara.

given for local residence *vis-a-vis* minority ownership (*id.*, para. 12), it did indicate that the fostering of minority ownership is, in and of itself, a fundamental policy goal of the Commission. Our award here of 100% full-time quantitative integration credit to Shearer effectively undermines much of the rationale underlying the Initial Decision and diminishes the significance of the exceptions of Absolutely Great and Ventura which are mainly directed against one another. We agree, however, with the ALJ that the only basis for deciding this case is the qualitative enhancement of the applicants' 100% full-time integration proposals.[16]

16. Upon evaluation of the qualitative factors to this case, it is our view that Shearer's proposal will provide the best practicable service to the public and therefore that it should ultimately be preferred over those of the other two applicants. Shearer's integration plan is entitled to substantial enhancement credit for its proposed 100% integrated minority ownership because that percentage is not only the maximum one can propose but also is far greater than that proposed by either Absolutely Great or Ventura.[17] The significance of this enhancement was emphasized in *Waters* where the Commission stated: "there is a critical under-representation of minorities in broadcast ownership, and full minority participation in the ownership and management of broadcast facilities is essential to realize the fundamental goals of programming diversity and diversification of ownership which are at the heart of the Communications Act and the First Amendment." *Id.*, para. 8. For this reason, minority ownership is to be given "significant weight" in comparative broadcast proceedings. *Id.*, para. 11. The enhancement credit for local residence to which Absolutely Great and Ventura are entitled (84.5% and 85%) is not as great in this proceeding as the credit to which Shearer is entitled for minority ownership participation because less than 100% of the principals of Absolutely Great and Ventura live or will live in Ventura and because Mr. Shearer proposes to move to Ventura in the event his application is granted. *See Policy Statement on Comparative Broadcast Hearings*, *supra*, 1 FCC 2d at 396. (Commission accords weight to proposed future local residence, albeit less than for residence of several years duration.)[18]

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[16] All of the applicants propose to use auxiliary power and are thus equal in this respect and there is no exception to the ALJ's finding that they are also equal in terms of comparative coverage.

[17] Shearer argues in its exceptions that minority ownership is an independent factor and not subsumed within the integration criterion. This argument has been rejected by the Commission. *See WPIX, Inc.*, 68 FCC 2d 381, 411–12 (1978). The *WPIX* holding was apparently reaffirmed in *Waters Broadcasting Corp.*, *supra*, at para. 12 ("Waters is also entitled to a substantial enhancement for its 100% minority and female ownership integrated with full-time management . . .").

[18] Contrary to a contention raised by Shearer, neither Absolutely Great nor Ventura had to present evidence demonstrating an awareness of Ventura in order to be

Moreover, with respect to past broadcast experience, Shearer's proposal is entitled to equal or near equal enhancement credit with those of Absolutely Great and Ventura since Shearer's 100% integrated owner has extensive managerial broadcast experience. *See*, *I.D.*, Findings, para. 54. Even if the ALJ is correct (*I.D.*, Conclusions, para. 15 n.4) that Shearer's experience is entitled to somewhat less enhancement credit than that of the other applicants, this comparative factor is of minor significance. *Policy Statement*, *supra*, 1 FCC 2d at 396.[19] And while Absolutely Great is entitled to some enhancement credit for the 49% female participation of Mrs. Sylvester and Mrs. Lara, that enhancement—as, the law now stands—is substantially less than that accorded for minority ownership. *See Radio Gaithersburg, Inc.*, 72 FCC 2d 820 (Rev. Bd. 1979), *review denied*, FCC 80–734, December 4, 1980; *but see Horne Industries, Inc.*, *supra*, n.6. In sum, while the choice involves only the enhancement factors, we conclude that in the factual context of this case the "significant weight" the Commission now accords integrated minority ownership in comparative proceedings outweighs the less than 100% credit awarded to Shearer's competitors for local residence, and that grant of Shearer's application will best serve the public interest, convenience, and necessity.

17. ACCORDINGLY, IT IS ORDERED, That the letters filed October 13, and 15, 1982, by Absolutely Great Radio, Inc. and October 13, 1982, by Ventura Broadcasting Co., ARE STRICKEN; and

18. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Absolutely Great Radio, Inc. on July 16 and August 19, 1982 ARE GRANTED, and the amendments ARE ACCEPTED; and

19. IT IS FURTHER ORDERED, That the application of William

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entitled to enhancement credit for the local residence of its principals. The *Policy Statement on Comparative Broadcast Hearings, supra,* 1 FCC 2d at 395-396, provides that local residence, standing alone, will be considered in weighing integration of ownership and management. Past participation in civic affairs is considered as an enhancement of an integrated owner's local residence background, but its absence is not a ground for disregarding a principal's local residence.

[19] Shearer's contention that Absolutely Great should receive a comparative demerit for the past broadcast record of Mr. Sylvester while at Station WGRY, Grayling, Michigan, is without merit. The Commission is interested only in unusually good or unusually poor past broadcast records and requires parties to make a threshold showing concerning the unusual nature of these records. *See Gilbert Group, Inc.*, FCC 81–281, 49 RR 2d 1081 (1981). The fact that Absolutely Great attempted and failed to demonstrate a threshold showing for an unusually good past broadcast record does not provide grounds for a demerit based on the showing proffered. A party must still make a threshold showing of an unusually poor past broadcast record before such evidence can be adduced and considered. No such proffer was made here by Shearer and, in any event, we are not persuaded that its allegations would have supported such a showing.

Shearer and Arike Logan-Shearer, Joint Tenants (File No. BPH-790323AC) for a construction permit to establish a new FM station at Ventura, California, IS GRANTED, and the applications of Absolutely Great Radio, Inc. (File No. BPH-11145) and Ventura Broadcasting Co. (File No. BPH-781129AH) ARE DENIED.

NORMAN B. BLUMENTHAL, *Member, Review Board,*
FEDERAL COMMUNICATIONS COMMISSION.

FCC 82D-15

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
ABSOLUTELY GREAT RADIO, INC. Ventura, California	BC Docket No. 80-366 File No. BPH-11145
VENTURA BROADCASTING CO. Ventura, California	BC Docket No. 80-367 File No. BPH-781129AH
WILLIAM SHEARER AND ARIKE LOGAN-SHEARER, JOINT TENANTS Ventura, California	BC Docket No. 80-368 File No. BPH-790323AC
For Construction Permit for a New FM Station	

Appearances

B. Jay Baraff, *James A. Koerner* and *Aaron Shainis*, on behalf of Absolutely Great Radio, Inc.; *Martin R. Leader*, *Clifford M. Harrington* and *David Oxenford*, on behalf of Ventura Broadcasting Co.; *James L. Winston* and *Harry P. Warner*, on behalf of William Shearer and Arike Logan-Shearer, Joint Tenants; and *Joseph Belisle*, on behalf of the Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH CHACHKIN

(Issued: March 4, 1982; Released: March 12, 1982)

1. This proceeding involves the mutually exclusive applications of Absolutely Great Radio, Inc. (AGR); Ventura Broadcasting Co. (VBC); and William Shearer and Arike Logan-Shearer, Joint Tenants (Shearer) for authority to construct and operate a new FM station in Ventura, California.[1] By Order (BC 34130) released July

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[1] Four additional applications were designated for hearing. The applications of San Buenaventura Wireless Co., Inc., Latino Broadcasting Corporation and Ventura Radio, Incorporated were dismissed with prejudice at the request of the applicants. The application of Richard H. Albert was dismissed by *Order* released on November 5, 1980 (FCC 80M-2240).

31, 1980, the captioned applications were designated for hearing on the following issues:

(1) To determine which of the proposals would, on a comparative basis, best serve the public interest.

(2) To determine in the light of the evidence adduced pursuant to the foregoing issues, which of the applications, if any, should be granted.[2] The Order provided that "for the purpose of comparison, the areas and populations which would receive FM service of 1 mV;m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue, for the purpose of determining whether a comparative preference should accrue to any of the applicants" (Par. 13).

2. Prehearing conferences were held on October 10 and November 7, 1980. Hearing sessions were held on December 11, 12, 15–19 and 22, 1980 at the Commission's Washington, D.C. offices. Proposed Findings of Fact and Conclusions of Law and Replies were filed by AGR, VBC and Shearer. The Broadcast Bureau filed Findings and Conclusions limited to comparative coverage considerations. The record in this proceeding was closed by *Order* (FCC 81M–753) released March 16, 1981. By *Order* (FCC 81M–3338) released October 21, 1981, the record was reopened and reclosed. By Order (FCC 81M–3339) released October 21, 1981, the parties were directed to submit a brief stemming from AGR's proposed integration of an alien principal. Briefs and Reply briefs were filed by each of the parties.

Findings Of Fact

Absolutely Great Radio, Inc.

3. AGR is a corporation comprised of James E. Sylvester, President, Chairman of the Board of Directors, and 51% shareholder; Donna Sylvester, his wife, Vice President and Secretary, Director and 33.5% shareholder; and Dora Luz Lara, a 15.5% shareholder (AGR Ex. 1, p. 1).[3] Neither AGR or its stockholders have an ownership interest in broadcast stations or other media of mass communications (AGR Ex. 8, p. 1).

4. Mr. Sylvester will be in charge of the day-to-day operation of the station as full-time general manager. Mr. Sylvester also intends to serve as sales manager and chief engineer of the proposed station and will be involved in all phases of the operation (AGR Ex. 5).

5. Mr. Sylvester was born in Detroit, Michigan, on March 13,

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[2] The designated issues have been renumbered for convenience.

[3] Ms. Lara and the Sylvesters have entered into a stock purchase agreement which provides that Ms. Lara can only sell her stock to AGR or the Sylvesters for a three year period. After the expiration of that period, the Sylvesters retain a right of first refusal should she decide to sell her stock (AGR Ex. 14; Tr. 869).

1943. His degree from Wayne State University, from which he graduated in 1967, was in mass communications with specialization in radio and television production. He has held a third-class radio telephone operator's license which he acquired in 1962, and to which broadcast endorsement was added in 1964. The license was upgraded to a second-class radio telephone operator's license in June 1965, and in 1966, he received a first-class radio telephone operator's license which has been renewed and which is still valid (AGR Ex. 2, p. 3–4).

6. Mr. Sylvester has been a resident of Ventura, California, since November 1977. Mr. Sylvester belongs to and participates in the Parent-Teachers Association and has participated in an association seeking to establish a Montessori school in Ventura. He is not an officer or committee member of the PTA. Mr. Sylvester joined the Ventura Chamber of Commerce in 1980. He is not an officer of the Chamber of Commerce. He has attended "a couple" of meetings of both organizations (AGR Ex. 2, p. 11; Tr. 534). Mr. Sylvester has also provided financial support to the Ventura County Symphony Association (Tr. 535).

7. Mr. Sylvester has past experience in the broadcast industry, having worked in broadcasting for radio and television for over twenty years. Mr. Sylvester's experience in radio includes ownership[4] and management and encompasses such areas as sales, program production, engineering, announcing, and programming. His television experience includes producing, directing, editing, technical directing, network operations directing, TV and film camera operation, slide photography, and television station design (AGR Ex. 2, p. 13). Mr. Sylvester has worked at WGRY(AM), Grayling, Michigan; KCET-TV, Los Angeles, California; KHJ-TV, Los Angeles, California; WKBD-TV, Detroit, Michigan; WWTV, Cadillac, Michigan; WWAM(AM), Cadillac, Michigan; WCKT-TV, Miami, Florida; WTVS-TV, Detroit, Michigan; KPFA(AM) and KPFB(FM), Berkeley, California; WQRS(FM), Detroit, Michigan; WLIN(FM), Detroit, Michigan; WDET-FM and WAYN(AM), Wayne State University, Detroit, Michigan (AGR Ex. 2, pp. 14–18).

8. *Past broadcast record* -Mr. Sylvester was President, Treasurer, Director and a 26% shareholder of Grayling Broadcasting Company (AGR Ex. 10, pages 7–8). In March 1970 the Commission granted the application of Grayling Broadcasting Company for a new 1 Kw daytime-only standard broadcast station at Grayling, Michigan, (AGR Ex. 2, p. 5). Mr. Sylvester served as General Manager of that

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[4] Mr. Sylvester had an ownership interest in Grayling Broadcasting Company, licensee of an AM station (WGRY) and holder of a construction permit for an FM station (WQON) in Grayling, Michigan (AGR Ex. 2, p. 5, 9, 10). At the admission session held on December 11, 1980, AGR urged that it should be permitted to put in evidence as to Mr. Sylvester's broadcast record as owner and manager of WGRY. The Presiding Judge permitted AGR to introduce such evidence (See Tr. 210–212). Findings as to AGR's past broadcast record are set forth, *infra*.

station, WGRY, from the time it commenced operations in August, 1970, until October 1977, (AGR Ex. 2, p. 5). Mr. Sylvester acquired an additional 26% stock interest in Grayling Broadcasting Company in 1972, giving him a majority stock interest in the WGRY licensee (Tr. 554). WGRY was sold by Grayling Broadcasting Company to Alpine Broadcasting in October 1977, (AGR Ex. 2, p. 10).

9. In 1975 Grayling Broadcasting Company, then controlled by Mr. Sylvester, applied for a construction permit for a new FM station to serve Grayling. A construction permit was granted to Grayling Broadcasting Company in 1976, and the call letter WQON were assigned (AGR Ex. 2, pp. 9–10). The WQON construction permit was sold to Grayling Broadcasters in June or July 1977 (Tr. 524). The WQON permittee was reimbursed only for legal, engineering and filing fees (Tr. 643).

10. In the application seeking authority to transfer the WQON construction permit to Grayling Broadcasters, it was claimed that WGRY and WQON were sold "for health reasons" (Tr. 531). Mr. Sylvester's direct testimony conceded, however, that the WQON permit was sold because of a condition in the contract to sell WGRY to a third party (Tr. 526). Mr. Sylvester believed that WGRY had reached its maximum potential value, and that he could not refuse the offer he received for the AM station (AGR Ex. 2, p. 10; Tr. 528). A condition of the WGRY sales contract was that the WQON construction permit either be sold to a third party or the permit surrendered to the Commission (Tr. 526).

11. In its initial construction permit application, Grayling Broadcasting Company promised to broadcast a minium of 5.0% news programming (AGR Ex. 10, p. 7). An analysis of the WGRY renewal application filed in 1973 indicates that WGRY did meet this commitment, devoting 8.3% of broadcast hours to news programming (AGR Ex. 10, p. 6). In its 1973 renewal, the WGRY licensee proposed to devote 8.0% of its broadcast hours to news (AGR Ex. 10, p. 10). It broadcast 9.6% news during the 1976 renewal composite week (AGR Ex. 10, p. 20).

12. WGRY's main newscast ran 15 minutes at noon. In addition, the station ran 6 minute newscasts at 6:25 a.m., 6:55 a.m., 7:25 a.m., 7:55 a.m., 8:25 a.m., 1:30 p.m., 3:30 p.m. and 4:45 p.m. These newscasts contained sports and weather information in addition to news (Tr. 677–678).

13. Initially, WGRY relied heavily on the Associated Press news wire for its news stories (Tr. 679–80). In December 1972, a news person was employed (AGR Ex. 10, p. 15). His primary duty was presentation of a 15 minute newscast at noon, and he also prepared news script for other announcers to present (Tr. 679). While the news person was a full-time employee, he had non-news responsibilities to fill as well (Tr. 817–818). There was a high turnover in personnel at WGRY, including news persons (Tr. 817). Mr. Sylvester could only

identify two persons, however, who devoted their activities to news reporting and preparation (Tr. 824). At times the news person was also operations director (Tr. 818).

14. WGRY had one studio for news gathering and production. The news person provided his own tape recorders. The station sales staff also had three mobile transceivers, which could be used to radio in news stories. The station had a remote pickup unit to allow for special remote broadcasts (AGR Ex. 12; AGR Ex. 13). Mr. Sylvester admitted that it was not unusual for a station in Michigan to have similar facilities, although they were unusual for stations in the immediate vicinity of Grayling (Tr. 820–22).

15. The only specific news event cited by AGR as being significant in WGRY's news efforts was WGRY's coverage of the Bear Mountain Resort. WGRY gathered news about this matter at the state and federal levels (AGR Ex. 10, p. 65). No specifics were provided as to the resources devoted to this story, or to the manner in which it was covered by WGRY.

16. In its initial construction permit application, Grayling Broadcasting Company promised to broadcast a minimum of 1.5% public affairs programming (AGR Ex. 10, p. 7). Its first renewal application for WGRY covered virtually a full three-year term, from August 1970 to June 30, 1973 (AGR Ex. 2, p. 5; AGR Ex. 10, p. 9). An analysis of WGRY's 1973 renewal application reveals that WGRY failed to meet its commitment regarding carriage of public affairs programming. Thus, WGRY broadcast only 1.4% public affairs programming during the 1973 composite week—less than the promised level (AGR Ex. 10, pp. 6, 7 and 9). In its 1973 renewal, Grayling Broadcasting Company reduced the WGRY public affairs programming proposed for the 1973–1976 license term to 1.4% (AGR Ex. 10, p. 10). This was marginally exceeded by the 1.6% public affairs performance in the 1976 renewal composite week (AGR Ex. 10, p. 20). Mr. Sylvester conceded that it was not unusual for AM stations to carry more than 1.5% public affairs programming (Tr. 567).

17. WGRY submitted, as part of its 1973 renewal application, an exhibit which listed, *inter alia*, the regularly scheduled programs that were logged as public affairs during the 1970–1973 license term (Tr. 560). The start date of each such program was specified in the exhibit. Significantly, not a single regularly scheduled public affairs program was identified as having been broadcast prior to February 5, 1973—only five months before the WGRY renewal application was due to be filed (AGR Ex. 10, pp. 15–19). In his testimony, Mr. Sylvester did not identify a single regularly scheduled public affairs program broadcast by WGRY prior to February 5, 1973 (Tr. 507–635).

18. The primary regularly scheduled program relied on by AGR to show the past broadcast record of James E. Sylvester is "Who

Knows". This program was broadcast from 10:00 a.m. to Noon each Monday through Friday, beginning April 9, 1973, (AGR Ex. 10, p. 15). The "Who Knows" program was described in WGRY's 1973 renewal application as a "phone-in show for listeners to ask questions on local issues or household hints". Some shows featured a guest speaker (AGR Ex. 10, p. 15).

19. The "Who Knows" program was logged both in the Public Affairs and Other program categories (AGR Ex. 10, pp. 15 and 26). AGR did not provide a breakdown giving the percentage of time normally devoted to each category. It is noted, however, that WGRY broadcast only 75 minutes of Public Affairs programming in the 1973 renewal composite week, and 82 minutes of Public Affairs programming in the 1976 composite week (AGR Ex. 10, pp. 9 and 20). Even assuming that WGRY ran no other Public Affairs programs, then, a maximum of 13% of the 600 minutes weekly of "Who Knows" programs consisted of Public Affairs programming.

20. Credit is also claimed for special programs or program series, related to discussion of issues, and covered by WGRY on other than a regularly scheduled basis. Four such special programs are cited during Mr. Sylvester's seven year tenure at WGRY. The first was a program series focusing on the need for a new high school. It was broadcast in 1972, and consisted of 9 hours of programming over an 8 day period. Mr. Sylvester moderated a panel of leaders and citizens who responded to telephone calls from the public (AGR Ex. 10, pp. 45–47).

21. The second program series involved coverage, on several occasions in 1972, of hearings of the Michigan Department of Natural Resources relating to the adoption of proposed rules regulating use of state waterways (AGR Ex. 10, pp. 60–62). Credit is also claimed for broadcast of a single budget meeting of the Crawford County Board of Commissioners. The date of this four hour broadcast was not supplied (AGR Ex. 10, pp. 63–64). The fourth program referred to in AGR's exhibits was an 11 hour broadcast over a single weekend relating to drug abuse. This program featured interviews with doctors, lawyers, police, counselors, clergy and other agencies related to the drug problem (AGR Ex. 10, p. 88).

22. In its initial construction permit application for WGRY, Grayling Broadcasting Company promised to broadcast a minimum of 4.0% "all other" programming, exclusive of news, public affairs, entertainment and sports (AGR Ex. 10, p. 7). WGRY broadcast only 3.2% "all other" programming during the 1973 renewal composite week (AGR Ex. 10, p. 9).

23. On cross-examination, Mr. Sylvester was asked to explain the variance between promise and performance (Tr. 558). He claimed that "the day selected for the composite week did not reflect all the efforts [WGRY was] making at that time" (Tr. 558). However, Mr. Sylvester could not point to any particular regularly scheduled

program that was absent during the composite week (Tr. 559). Indeed, he conceded he meant "special programs . . . not necessarily regular programs . . ." (Tr. 558–559).

24. In its 1973 renewal application, Grayling reduced the WGRY "all other" programming commitment for the 1973–76 license term to 3.5% (AGR Ex. 10, p. 10). This was marginally exceeded by the 3.8% "all other" programming performance reflected in the 1976 renewal composite week (AGR Ex. 10, p. 20).

25. As noted above, the "Who Knows" program was logged in both the Public Affairs and in the Other program categories. That program ran a total of 600 minutes per week. WGRY ran a total of 165 minutes of "all other" programming in the 1973 composite week, and 194 minutes in the 1976 composite week (AGR Ex. 10, pp. 9 and 20). Thus, even assuming no other programs in the composite week fell into the "all other" category, at most 32% of the "Who Knows" program was devoted to Other programming.

26. AGR cites four regular programs in the "all other" category as supporting its claim of a past broadcast preference for Mr. Sylvester. The first is "Community Schools Report", a 5–7 minute, twice daily program which provided daily information about adult education, concerts, travelogues, theatrical performances, and other activities involving the community auditorium which was part of the new high school complex in Grayling. (AGR Ex. 10, pp. 27 and 81).

27. The second cited program is "Job Alert", a three to 3–6 minute twice daily program which provided announcements about work availabilities within the area (AGR Ex. 10, p. 81, Tr. 517–518). No evidence was offered as to when these programs were first broadcast over WGRY, or whether they were still being broadcast when Mr. Sylvester left WGRY. It should be noted, however, that "Community Schools Reports" was *not* listed as a typical and illustrative program in WGRY's 1973 renewal application, and that "Job Alert" was listed in neither the 1973 nor the 1976 renewal for WGRY (AGR Ex. 10, pp.15–19 and 26–27).

28. WGRY also broadcast two education program series during the period in which Mr. Sylvester held an interest in the station. "Books for the Asking", a 5–6 minute program broadcast twice weekly beginning February 5, 1973, consisted of a discussion by the County Libriarian of new books available at the library (AGR Ex. 10, pp. 16, 26 and 82). WGRY also broadcast a series produced by Kirtland Community College called "Project 360". It explored job opportunities and how to apply for work successfully. It was a 4–1;2 minute program broadcast twice weekly beginning April 9, 1973. While there is no evidence of record as to the date of completion of this series, it is noted that the program was not listed in WGRY's 1976 renewal (AGR Ex. 10, pp. 16, 26–27 and 82).

29. Mr. Sylvester claimed credit for military programming on WGRY, averring that "WGRY always made two or more hours per

day available to the military . . ." (AGR Ex. 10, p. 51). On cross-examination, Mr. Sylvester conceded that such programs were only carried when troops were in town, perhaps four to eight weeks per year. He also conceded that this coverage began some time after 1973, although he could not give the exact date (Tr. 568–569). These military programs consisted of news and information as well as music, and was hosted by personnel from the information offices of the military units involved (Tr. 632–633). They were logged in the "Other" program category (AGR Ex. 10, p. 26).

30. Mr. Sylvester was asked by the Presiding Judge to identify specific controversial issues of public importance that were covered by WGRY. He could identify only three such issues: a school board election, local hearings on taxation, and the river use regulations previously discussed (Tr. 681–683). When pressed again on this point, Mr. Sylvester was unable to identify any other issues of public importance on which both sides had been allowed to be heard (Tr. 685–686).

31. WGRY originally proposed to broadcast 75 PSA's. Its 1973 renewal application reported it had run 185 such announcements. Its 1973 renewal application proposed the carriage of 100 PSA's. The 1976 renewal application reflected its broadcast 139 PSA's (AGR Ex. 10, pp. 3, 6, 7 and 21).

32. Mr. Sylvester testified that he estimated that the cost of providing news and public affairs programming undertaken by WGRY would have constituted approximately 17% of the station's overall operating costs (AGR Ex. 10, p. 3). However, Mr. Sylvester could not estimate the percentage of operating costs devoted to engineering, sales, and programming other than news and public affairs (Tr. 562–563). He conceded that he arrived at his estimate by arbitrarily assuming that 50% of the program department's budget and 50% of the station telephone bill was spent on news and public affairs programming (Tr. 564). In fact, however, news and public affairs programming constituted a maximum of 11.2% of total programming (Tr. 565). Because the testimony of Mr. Sylvester in this regard is speculative and unsupported, it cannot be credited.

33. AGR also submitted evidence showing that it devoted 9.6% of all broadcast hours to commercial matter in the 1973 renewal composite week, and 9.75% of all broadcast hours to commercial matter in the 1976 renewal composite week (AGR Ex. 10, pp. 11 and 22). AGR did not offer any evidence indicating whether these percentages reflected self-imposed limitations on the carriage of commercial matter or the inability of WGRY to attract higher levels of advertising.

34. WGRY received one programming award during Mr. Sylvester's tenure. In 1973, it was the recipient of the American Legion's Fourth Estate Award. This award is made annually to Michigan communications media and one winner is selected in each of four

divisions, including radio. WGRY was the radio division winner (AGR Ex. 10, p. 113).

35. Mr. Sylvester has not done any statistical study analyzing the amount of news, public affairs or other programming broadcast by typical stations (Tr. 566). Nor has he ever done any such comparative analysis of daytime AM stations in small cities in Michigan (Tr. 566). The record is, therefore, devoid of any basis upon which to compare the programming of WGRY with other stations.

36. Mrs. Sylvester is proposed as full-time programming news director of the station. She will oversee and coordinate all programming, news, public affairs, public service, and other programming on the proposed station (AGR Ex. 6, p. 1; Tr. 703, 715–16). Mrs. Sylvester currently spends about 15 hours a month distributing Amway products and does not anticipate any increase in the hours devoted to Amway. She intends to continue her relationship in the event AGR receives a construction permit. However, if her work at the station precludes her continuing her Amway business, she is prepared to give up that business (Tr. 761–63).

37. Mrs. Sylvester was born in Los Angeles, California on February 2, 1945. She graduated from Los Angeles City College with an Associate of Arts Degree in Music (AGR Ex. 3, pp. 1, 4). Mrs. Sylvester has lived in Ventura, California since November 1977, where she and her husband own their own home (AGR Ex. 2, p. 11). She is a member of and attends functions of the Ventura Chamber of Commerce and serves on several committees including: (1) Youth and Education; (2) Special Events; (3) Retail Development; (4) Community Improvement; and (5) Governmental Affairs. She is also a member of the Parent Teachers Association and participates with her children in activities sponsored by the public schools in Ventura. She has also worked with a group of parents seeking to establish a privately-owned and operated school for accelerated education in Ventura (AGR Ex. 3, pp. 10–11). Her involvement in the community as an independent Amway distributor has also brought her into contact with individuals of all walks of life (AGR Ex. 3, p. 11).

38. Mrs. Sylvester has had past broadcast experience. She was employed initially at KCOP(TV), Los Angeles, California. She worked there as a Nighttime Traffic Log Typist. She was also involved in sales, and was public service director (AGR Ex. 3, pp. 4–5). Her involvement in sales at KCOP was limited to filling out computer cards so that make-good announcements could be scheduled (Tr. 768–69). Her responsibility as public service director was to schedule public service announcements into pre-formulated time slots. She did not have responsibilities for program production (Tr. 770–73). Mrs. Sylvester worked at KCOP for one and a half years and then accepted an offer from KCET in Los Angeles, a public broadcasting station, where she served as traffic director. She continued in that position for about one and a half years (AGR Ex. 3,

pp. 4–5). After marrying Jim Sylvester, she moved to Grayling, Michigan and worked at WGRY during the period of 1970 — October 1977, when Mr. Sylvester relinquished his ownership interest in WGRY. Mrs. Sylvester worked full-time for most of that time. Her work at WGRY was varied and included providing air talent, program production, log preparation, accounting, sales, secretarial, news gathering and reporting (AGR Ex. 3, pp. 5–6; Tr. 597). Mrs. Sylvester is not identified in the 1973 and 1976 renewal applications for WGRY as one of the persons who determined the day-to-day programming, made decisions, or directed the operation of WGRY (Tr. 806–809). However, Mrs. Sylvester considered herself to be assistant station manager, even though she does not recall ever having held such an official title (Tr. 774). Mr. Sylvester testified that when he was absent from WGRY, he considered that his wife would be in charge (Tr. 622), that she did whatever had to be done as the owner's wife (Tr. 689), and that she typically worked from 40 to 60 hours, assisting him in managing the station (Tr. 705–06). He stated that his failure to list his wife as a management employee was an oversight and due to the fact that he never viewed his wife in the same capacity as other employees (Tr. 610). No testimony has been offered rebutting Mr. and Mrs. Sylvester's testimony concerning the nature of Mrs. Sylvester's employment at WGRY (Tr. 658, 660–1, 796–7).

39. Dora Luz Lara, a Spanish-surnamed woman of Mexican origin, is proposed as the station's full-time director of public and minority affairs and as assistant program director (AGR Ex. 7, p. 1). Ms. Lara is not a citizen of the United States (Tr. 836). Ms. Lara will produce "La Voz de la Raza", a thirty minute bilingual program which will be braodcast once a week, in cooperation with El Concilio del Condo de Ventura and other members of the Spanish-speaking community (AGR Ex. 7, pp. 1–2; Tr. 861). She will act as liaison between the station and the various minority groups within the community and have responsibility for developing specific programs to deal with concerns of all minorities (AGR Ex. 7, pp. 1–2). Among her other duties, Ms. Lara will assist in producing a daily one-hour public affairs program called, "California Forum" which will be primarily produced by Mrs. Sylvester (Tr. 701). In addition, in the absence of Mrs. Sylvester from the station, Ms. Lara will be in charge of the news and programming departments (Tr. 786). Ms. Lara, who does not have broadcast experience (Tr. 805), will receive training, prior to grant of the construction permit, from Mr. and Mrs. Sylvester, who will be her supervisors (Tr. 717). Ms. Lara presently works in a banking clerical position for which she receives $8,000 per year. She will be paid the same salary for her services to AGR (Tr. 866, 872–3).

40. Ms. Lara resides in North Hollywood, California and plans to commute to the station's Ventura location, a distance of 58.5 miles

from her home (Tr. 836, 875; AGR Ex. 15). There is no record evidence that she has ever resided in the Ventura area or of any civic participation by Ms. Lara.

41. AGR has specified emergency auxiliary equipment (AGR Ex. 10, pp. 1–4; Tr. 184).

Ventura Broadcasting Co.

42. VBC is a corporation comprised of Michael R. Thomas, President, Director and 85% shareholder; Edward Dela Pena, Vice President, Director, and 15% shareholder; and Leighton G. Long, Secretary/Treasurer, and Director (VBC Ex. 1 p. 1). Neither VBC or its principals have an ownership interest in broadcast stations or other media of mass communications (VBC Ex. 1, p. 2; VBC Ex. 2, p. 1; VBC Ex. 3, p. 1).

43. Mr. Thomas will be the full-time general manager of the proposed station (VBC Ex. 2, p. 1). He was born in Cleveland, Ohio on March 24, 1934 and lived in East Cleveland, Ohio until 1951, when he moved with his parents to Los Angeles, California. Mr. Thomas is a graduate of Don Martin's School of Radio and TV in Hollywood, California. The 18 month course of study included Mr. Thomas' obtaining a First Class Radio Telephone Operator's License (VBC Ex. 2, pp. 1–2).

44. Mr. Thomas first moved to Ventura in July 1958 and lived there until 1963. He returned to Ventura County in November 1968 and has lived continuously in the city of Ventura since 1974 (VBC Ex. 2, p. 2). Mr. Thomas was not an officer or director of a Ventura civic organization (Tr. 929). Mr. Thomas has been a member of Temple Beth Torah in Ventura for the past twelve years. He has also been a member of the Brotherhood, the Temple's Men's club. Mr. Thomas has been a member of the Ventura Parents-Teachers Association for approximately the same period, through various schools in the Ventura Unified School District. He has also been active in youth related activities. Mr. Thomas served as public address announcer for the Foothill Little League and Senior League in the mid 1970's and coach in the Girl's Tri-Valley Softball League in 1979 (VBC Ex. 2, pp. 5–6). Mr. Thomas also worked with numerous organizations in the city of Ventura and Ventura County as a management level employee of three radio stations in the Ventura-Oxnard market over a period of approximately 18 years (VBC Ex. 2, p. 6).

45. Mr. Thomas has past experience in the broadcast industry, having worked at radio stations beginning in March 1957 and continuing to the present. Mr. Thomas has worked at KMPC, Los Angeles, California; KONE, Reno, Nevada; KUDU, Ventura, California; KVEN(AM) and KVEN-FM, Ventura, California; KCBQ(AM), San Diego, California; KAFY(AM), Bakersfield, California; KUZZ(AM), Bakerfield, California; KLYD(AM), Bakersfield, Califor-

nia; KDUO(FM), San Bernardino, California; KBBQ and KBBY(FM), Ventura, California; and KOXR(AM), Oxnard, California. Mr. Thomas has held management level positions including sales manager, station manager, and general manager (VBC Ex. 2). Mr. Thomas is currently employed as sales manager of KOXR(AM). He intends to resign that position and devote full-time to the proposed FM station in the event VBC's application is granted (VBC Ex. 2, pp. 5–6). Mr. Thomas also operates Mr. T. Broadcast Services, a small advertising agency which has organized occasional "youth dances" in the city of Ventura. He intends to deactivate the agency except maybe to put on an occasional youth dance in Ventura (Tr. 928–9).

46. Edward Dela Pena, who is of Hispanic heritage, is proposed as the full-time chief engineer of the proposed FM facility (VBC Ex. 3, p. 1). Mr. Dela Pena has committed himself to work a minimum of 40 hours each week at the station (Tr. 902). Mr. Dela Pena expects to be heavily involved in the construction of the proposed station (Tr. 915). However, the need for Mr. Dela Pena's services as a chief engineer will greatly diminish after the proposed Class A station becomes operational. VBC intends to use state of the art equipment which is not likely to break down (Tr. 915–916). In addition, the equipment will contain easily replaceable parts which according to Mr. Dela Pena, "even someone with a modicum amount of knowledge can plug a module in and try to get it back in" (Tr. 915). Once the station becomes operational, Mr. Dela Pena will spend most of his time at the station's studio supervising the technical aspects associated with the production and recording of programming such as news actualities and promos. Mr. Dela Pena performed similar duties for station KHJ, Los Angeles, California. Mr. Dela Pena will not be involved with program content (Tr. 916).[5]

47. Mr. Dela Pena was born in Lower California, Mexico on February 22, 1920. He moved to Los Angeles, California where he grew up. He became a naturalized citizen of the United States in July 1943 (VBC Ex. 3 p. 2). Mr. Dela Pena has an Associate Degree in Electronics which he received in 1941 from Los Angeles City College (VBC Ex. 3, p. 2). Mr. Dela Pena presently resides in Van Nuys, California about 45 miles from Ventura and plans to commute to the proposed station (Tr. 888).[6]

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[5] VBC claims that Mr. Dela Pena will be involved in programming decisions (VBC Ex. 3, p. 1). However, this claim is contradicted by Mr. Dela Pena's description of his role (Tr. 916). In addition, Mr. Dela Pena has had no discussions with Mr. Thomas relative to programming in which he will be directly involved nor has he been given specific assignments in the programming area (Tr. 891). In addition, the proposed station intends to employ a combination public affairs/news director who will act as a program director in the initial state of operation. The program director's job will be minimal since the station's programming will be automated (Tr. 922–24).

[6] Mr. Dela Pena has regularly commuted 40 miles to his place of employment in the

48. Mr. Dela Pena has broadcast experience. During the period of 1942–1946, he served with Armed Forces Radio in the position of liaison between the Armed Forces and the recording studios that were involved in editing and producing entertainment shows for the Armed Forces (VBC Ex. 3, p. 2; Tr. 889). After his discharge from the Army, Mr. Dela Pena went to work for Standard Broadcasters in Hollywood, California as a sound recording engineer (VBC Ex. 3, p. 2). In 1947, he joined the Don Lee Broadcasting System in Los Angeles to do engineering maintenance at radio station KHJ. In 1953, Mr. Dela Pena was promoted to Engineering Operations Supervisor at KHJ. In 1962, he was promoted to Chief Engineer for RKO Radio Stations KHJ and KRTA-FM in Los Angeles. Mr. Dela Pena continued in that position until his retirement in 1977 to go into business for himself (VBC Ex. 3, p. 3; Tr. 907–8).

49. Mr. Dela Pena is presently self-employed as a consultant to radio stations, studios, and small manufacturers (VBC Ex. 3, p. 3; Tr. 895, 911). He has about eight regular clients at this time (Tr. 910). They are not on a retainer basic, but there is an ongoing relationship whereby Mr. Dela Pena will provide services to the extent he has time available. He has no written contracts or understandings with his clients (Tr. 910). Mr. Dela Pena's work as a consultant varies from week to week—one week he may be working 60 hours and the next week not at all (Tr. 896). Mr. Dela Pena plans to reduce his consulting efforts should the VBC application be granted (Tr. 897, 920). His commitment is to work a minimum of 40 hours each week at the station. He is willing to lose his existing consulting clientele should it be necessary to allow him to meet his commitments to VBC (Tr. 901–902, 904, 920).[7]

50. VBC intends to install a generator to provide auxiliary power for the station in the event of electrical power failure (VBC Ex. 1, p. 2).

William Shearer and Arike Logan-Shearer

51. William Shearer and Arike-Logan Shearer, who are black, are husband and wife. Section I, pages 1 and 2 of FCC Form 301, tendered for filing with the Commission on March 2, 1979, identifies

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past (Tr. 919). VBC will arrange for an engineer in the Ventura area to be on call for emergencies should Mr. Dela Pena not be immediately available at the station (TR. 913–15, 961).

[7] Mr. Dela Pena presently earns about $25,000 per year as a consultant. If the VBC application is granted, he will be paid $10,000 per year as Chief Engineer, receive a $7,000 annual pension from RKO and receive income from investments totaling $30–35,000 (Tr. 898–9). He believes this is sufficient income to support himself until the station produces income for its shareholders (Tr. 898).

the applicant as "joint tenants" (Shearer Ex. 7). Section II, Table 1, Item g[8] of the Shearer application states that Mr. Shearer is to have 50% and Dr. Logan-Shearer is to have 50% of the ownership interest of the applicant (VBC Ex. 4). Mr. Shearer was responsible for preparing Section II. He testified that the information contained in Section II including Item g was accurate at the time the application was prepared and is still accurate (Tr. 990–2). It is his intention and understanding that he and his wife each own 50% of the proposed station (Tr. 992). Dr. Logan-Shearer also understands that she owns 50% of the proposed station and is one-half of the applicant (Tr. 1073). Estate tax planning played only a minimal part in the decision of the Shearers to file the application in the form of a joint tenancy (Tr. 993). The Shearers do not own any other investment property in joint tenancy (Tr. 1033). Dr. Logan-Shearer will have the authority to bind the joint tenancy and sign contracts on behalf of the joint tenancy (Tr. 998).

52. Mr. Shearer and Dr. Logan-Shearer do not presently have an ownership interest in broadcast stations or other media of mass communications. Mr. Shearers is currently vice president and general manager of K-ACE, owned by All Pro Broadcasting, Inc. In the event of a grant of the Shearer application, he would resign as vice president and general manager of K-ACE. Dr. Logan-Shearer has filed an application for a translator station in Sacramento, California. She is also president, director and 50% shareholder of Corporation for Black Television of Los Angeles, a corporation which has filed an application for a translator station in Los Angeles, California (Shearer Ex. 4, p. 1).

53. Mr. Shearer will be full-time employee serving as the general manager and sales manager of the proposed station (Shearer Ex. 3, p. 1). He was born on March 22, 1936, in Columbia, Ohio. He is a graduate of Ohio State University. Mr. Shearer moved to California in 1962 (Shearer Ex. 1). He is presently a resident of Los Angeles, California. He has never been a resident of Ventura, California and has never been an officer or member of any civic organization in Ventura, California (Tr. 969, 989). Mr. Shearer and his wife intend to move to Ventura in the event of a grant of the proposed FM station (Shearer Ex. 1, p. 10).

54. Mr. Shearer has broadcast experience. In 1968, he became an account executive with Radio Station KGFV in Los Angeles. In 1973 he was offered and accepted the position of Vice President, Sales for FM station KAGB. In the same year he joined Radio Station KLOS, owned and operated by the American Broadcasting Company. In March 1977, Mr. Shearer became general manager of K-ACE. Mr. Shearer has recently become Vice President-General Manager of K-

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[8] Item (g) reads "Percent Of Ownership Of Partnership Or Percent Of Voting Stock Or Membership".

ACE (Shearer Ex. 1, pp. 1–2). In addition, Mr. Shearer has been a part-time instructor in broadcast sales at Los Angeles School of Broadcasting, guest lecturer in broadcast management at UCLA, and guest lecturer at a number of junior and high schools in Southern California (Shearer Ex. 1, p. 9).

55. Dr. Logan-Shearer is proposed as a part-time employee of the station. She plans to act as the Public Affairs Director of the station and is proposing to work 20 hours a week (Tr. 1031, 1051, 1053).

56. Dr. Logan-Shearer was born on February 2, 1945 at Nesbit, Mississippi. She has completed 3 years of undergraduate study in science and 51;2 years of study in medicine and is licensed to practice medicine in the State of California (Shearer Ex. 2, pp. 1–2). Dr. Logan-Shearer entered into private practice in the summer of 1975. She reduced her workload in 1978[9] to pursue other activities (Shearer Ex. 2, p. 3). She intends to practice medicine for a total of five to seven years (Tr. 1044–5). Dr. Logan's decision to retire from the daily practice of medicine antedates the application for the Ventura FM station (Tr. 1045). She does not intend to engage in a limited medical practice in the Ventura area (Tr. 1045).

57. Dr. Logan-Shearer owns several real estate interests including an 18 unit apartment house, and a house in Los Angeles, and an office building in Inglewood, California (Tr. 1074–75). Her net worth from her business interests is roughly one million dollars (Shearer Ex. 2, p. 3). She is a 60% owner of the Emerald International Export Import Company (Tr. 1074). Dr. Logan-Shearer employs a business manager to manage her rental properties. Her export-import business requires approximately eight hours a month of her time and her real estate investments about two or three hours a month (Tr. 1078–79). She is also a clinical instructor in the Department of Family Medicine at UCLA (Tr. 1060). The time committed for this teaching activity is 26 hours per year and she has no intention of increasing that time commitment (Tr. 1060–61).

58. Dr. Logan-Shearer is vice chairperson of the Board of Directors of the Black Business Association of Los Angeles (Tr. 1047). She is a member of NAACP in Los Angeles and of the Los Angeles Foreign Trade Association (Tr. 1047). Dr. Logan-Shearer intends to retain her membership in both the NAACP and the Foreign Trade Association since her membership would not involve any time (Tr. 1048). She would have to curtail her activities with the Black Business Association but would remain a financial member and continue to support this group (Tr. 1048).

59. Dr. Logan-Shearer is not a resident of Ventura, California and is not a member or officer in any civic organization in that community (Tr. 1051). The Shearers intend to move to Ventura in the event their application is granted (Shearer Ex. 3, p. 1). Dr. Logan-

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[9] The Shearers married in October 1978 (Shearer Ex. 2, p. 4).

Shearer has no prior broadcast experience (Shearer Ex. 3, p. 2; Tr. 1051).

60. Shearer proposes to install an auxiliary generator to provide auxiliary power for the station in the event of an electrical power failure (Shearer Ex. 5; Tr. 354, 397).

Comparative Coverage

61. Each of the applicants proposes to construct a Class A FM broadcast station on Channel 296A. The power and height combination proposed by each applicant is essentially equivalent to the maximum Class A facilities permitted (3 kW effective radiated power at 300 feet above average terrain) (Joint Ex. 1, pp. 1–2). The transmitter sites proposed by AGR, VBC and Shearers are all located within 400 feet of each other. Since AGR, VBC and Shearers propose to operate from what is essentially a common site with maximum facilities, the areas which would be provided primary service (areas receiving a predicted signal equal to or better than 60 dBu or 1.0 mV/m) from their proposed stations are identical.[10]

Conclusions

1. This proceeding involves the mutually exclusive applications of AGR, VBC and Shearer to construct a new FM station in Ventura, California. The only issues to be resolved in this proceeding are the standard comparative issues. The applicants must be weighed in accordance with the Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965). The *Policy Statement* sets forth two major goals toward which the comparative process is to be directed, *i.e.*: (a) the best practicable service to the public, and (b) a maximum diffusion of control of the media of mass communications, *Policy Statement*, 1 FCC 2d at 394. Several factors are significant in the two areas of comparison. These are discussed below in comparing the applicants.

Diversification of Control of the Media of Mass Communications

2. None of the three applicants, nor any of their principals, have present interests in media of mass communications. Dr. Logan-Shearer has interests in two pending translator applications. Neither application has been granted and is therefore not attributable to Shearer for comparative purposes.

Integration of Ownership and Management

3. AGR proposes 100% full-time integration of ownership and management. The three owners of AGR will hold responsible management level staff positions. Mr. Sylvester, 51% shareholder,

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[10] These proposed stations would provide primary FM service to a 352 square mile area having a population of 233,090 (Joint Ex. 1, Fig. 1A).

officer and director of AGR, is proposed as full-time general manager as well as sales manager and chief engineer. Mrs. Sylvester, 33.5% shareholder, officer, and director is proposed as full-time programming news director. Dora Luz Lara, 15.5% shareholder, is proposed as the station's full-time director of public and minority affairs and as assistant program director. Shearer questions whether the need to spend time with her children will permit Mrs. Sylvester to fulfill her full-time integration proposal. However, Shearer's contention is grounded solely on speculation. No evidence has been offered which would permit a conclusion that family obligations will interfere with her integration commitment. Shearer also contends that Ms. Lara does not have the education or employment background to assume her proposed responsibilities. These contentions are rejected. Initially, the lack of broadcast experience has never been equated with an inability to effectuate an integration proposal. The *Policy Statement* makes clear that previous broadcast experience, as an attribute of participating owners, is of only minor significance since emphasis upon this element could discourage qualified newcomers to broadcasting and since experience generally confers only an initial advantage, 1 FCC 2d at 396. See also *Webster-Baker Broadcasting*, FCC 81R–109, paragraph 17 (Rev. Bd. 1982). In addition, Shearer has not cited any case which sets forth educational standards applicable to potential broadcast positions. Broadcasters appear to come from all walks of life and from diverse educational and employment backgrounds. The fact that Ms. Lara presently works in a banking clerical position does not appear to be an impediment to her carrying out her integration proposal. Ms. Lara will receive training, prior to grant of the construction permit, from Mr. and Mrs. Sylvester. Moreover, Ms. Lara's background and fluency in Spanish should serve her in good stead in carrying out her responsibilities, particularly in her dealings with the 12.2% of Ventura of Hispanic heritage. The legitimacy of Mrs. Sylvester's and Ms. Lara's holding of management level positions is also challenged on the ground that Mrs. Sylvester will not have the power to hire and fire employees and Ms. Lara will not have authority to change the station's programming. It is clear that Mr. Sylvester, 51% shareholder and general manager, will be in charge of day-to-day operations. However, the fact that ultimate decision making rests with Mr. Sylvester does not detract from the fact that Mrs. Sylvester and Ms. Lara will hold policy making, and not consultative, positions. It is concluded that AGR's integration proposal is credible. AGR is entitled to 100% quantitative integration credit.

4. Ms. Lara, AGR's 15.5% shareholder, is an alien. VBC and Shearer contend that AGR should receive no integration credit for her participation and that AGR should be assessed a substantial comparative demerit because of its alien ownership. These contentions are rejected. Section 310(b)(3) provides, in pertinent part, that a

broadcast license shall not be granted to "any corporation of which any officer or director is an alien or of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government or representative thereof or by any corporation organized under the laws of a foreign country." Congress placed restrictions on alien ownership and control of broadcast stations and other radio facilities in order to prevent alien activities against the government in time of war. The provisions of the Act are intended to prevent alien control and not the mere possibility of alien control. *James A. Noe* v. *FCC*, 260 F.2d 739, 17 RR 2137 (D.C. Cir. 1958); *Data Transmission Co.*, 52 FCC 2d 439 (1975). AGR has fully complied with the provisions of the Act since Ms. Lara holds less than 20% of AGR's stock and is not an officer or director of the corporation. VBC contains that national policy favoring ownership and control of broadcast facilities by Americans requires assessment of a comparative demerit against AGR. However, Section 310(b) is concerned solely with actual alien control. Control of AGR rests with Mr. Sylvester. Ms. Lara's 15.5% interest in AGR does not give her control of AGR. Nor does her position as director of public and minority affairs and assistant program manager raise a question of *de facto* control. As discussed, *supra*, Mr. Sylvester will be in charge of the day-to-day affairs of the proposed station. The suggestion that the import of Section 310(b) should be expanded to include situations where there is less than actual control is neither within the letter or spirit of the statute. Ms. Lara's proposed involvement in AGR hardly endangers national security. Moreover, VBC and Shearer have not demonstrated that Ms. Lara's alien status will impair her ability to effectuate her integration proposal. The *Policy Statement* stresses the importance of ownership participation in station operation. There is no requirement that owners be officers or directors in order to receive integration credit. VBC and Shearer have not cited any case precedent where the Commission has made a distinction between alien and citizen participation in evaluating integration proposals. The Presiding Judge agrees with the Bureau and AGR that there is no public interest rationale which would support giving AGR a comparative demerit or diminishing the integration credit accorded AGR.[1]

5. The qualitative attributes of AGR's integrated owners en-

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[1] AGR correctly notes that the Commission has declined to adopt any rules limiting alien ownership or control of cable TV systems. See *Alien Ownership of Cable TV Systems*, 59 FCC 2d 723; *Foreign Ownership of Cable Television Systems*, 77 FCC 2d 73 (1980). Similarly, the Commission has permitted aliens to be officers of a parent company, *Business Men's Assurance Co. of America*, 49 FCC 2d 909 (1974). Also, the Commission has granted an application for a station in the Cable Television Relay Service notwithstanding that the parent corporation was controlled by aliens. *G.R.C. Cablevision, Inc.*, 47 FCC 2d 467 (1974). These actions make clear the

hances its proposal. Specifically, AGR is enhanced because Mr. and Mrs. Sylvester are residents of Ventura, have participated in the community's civic affairs and have previous broadcast experience. In addition, AGR receives a plus factor for participation by a minority owner and additional credit for female participation. See *Webster-Baker, supra*, paragraphs 22 and 24.

6. AGR also contends that it is entitled to a preference under the past broadcast record criterion. AGR's contention rests on Mr. Sylvester's stewardship of standard broadcast station WGRY, Grayling, Michigan. Mr. Sylvester had a 26% interest in WGRY from the date it commenced operations until 1972, when he purchased an additional 26% of the outstanding stock of the licensee, Grayling Broadcasting Company. The *Policy Statement* makes clear that the Commission is interested in records which are unusually good and that a past record within the bounds of average performance will be disregarded. *Policy Statement, supra*, 1 FCC 2d at 398. In determining whether a record is unusually good, the Commission considers whether the record shows unusual attention to the public's needs and interests such as special sensitivity to an area's changing needs through flexibility of local programs designed to meet those needs. *Id.* The fact that an applicant has carried out representations made to the Commission does not lead to an affirmative preference. *Id.*[2] Evidence concerning an applicant's past broadcast record must be complete. *Terre Haute Broadcasting Corp.*, 19 RR 2d 487 (1970). "A finding of unusually good record cannot be made unless all aspects of it, not just some of them, are shown . . . ." *Id.* More than a fragmentary selection of favorable parts of a record is required. *Id.* An applicant seeking a past broadcast record preference must tender evidence enabling a full evaluation of its representative programs in the context of its overall operation. *Triple C Broadcasting Corporation*, 16 FCC 2d 357 (1969).

7. On the basis of these standards, WGRY's record can not be characterized as unusually good. An analysis of WGRY's 1973 and 1976 renewal applications demonstrates that WGRY carried the percentage of news promised. However, no evidence was introduced that WGRY's news programming showed unusual attention to the public's needs and interests. An analysis of WGRY's 1973 application also reveals that WGRY failed to meet its modest commitment regarding carriage of public affairs programming. Thus, WGRY broadcast 1.4% public affairs programming, less than the promised level of 1.5%. The 1973 renewal application proposed 1.4% public affairs programming, which was marginally exceeded by the 1.6%

Commission's intention not to expand the scope of Sections 310(b) applicable to aliens.

[2] A significant failure to carry out representations made to the Commission may signify an unusually poor broadcast record. *Policy Statement, supra*, 1 FCC 2d at 398.

public affairs performance reflected in the 1976 renewal composite week. Mr. Sylvester conceded it was not unusual for AM stations to carry more than 1.5% public affairs programming. WGRY also failed to live up to its commitment to broadcast a minimum of 4.0% "all other" programming exclusive of news, public affairs, entertainment and sports. WGRY broadcast only 3.2% "all other" programming during the 1970–1973 period. WGRY's commitment in its 1973 renewal application to broadcast 3.5% "all other" programming was marginally exceeded by the 3.8% "all other" programming reflected in the 1976 renewal composite week. WGRY's failure to carry out its public affairs and "all other" programming representations is not consistent with a claim of an "unusually good" record. Moreover, no evidence has been offered which allows a comparison of WGRY's performance with those of comparable stations. Absent such evidence, no conclusion can be reached as to whether the percentages of time devoted to news, public affairs, and "all other" programming compares favorably or unfavorably with like stations. See *Minneapolis Star and Tribune Company*, FCC 82R–7, paragraph 17 (Rev. Bd. 1982).

8. AGR has attempted to bolster its position with detailed descriptions of specific programming. However, AGR has cited only one regularly scheduled program in the 1973–1977 time span which contained public affairs elements: the "Who Knows" program. "Who Knows", a phone-in show, was logged both in the Public Affairs and "other program" category. AGR did not provide a breakdown giving the percentage of time normally devoted to each category. The program is described as a show for listeners to ask questions on local issues and household hints. No evidence was presented to show how, if at all, this program was made flexible to meet changing needs. AGR has also claimed credit for four programs in the "all other" criteria. However, these programs, in conjunction with WGRY's other programming efforts do not support a request for comparative credit. WGRY's showing reflects some attention to local needs. However, its showing falls far short of demonstrating an unusually good past broadcast record. WGRY operated within the bounds of average performance and no preference for past broadcast record will be awarded.

9. VBC also proposes 100% full-time integration of ownership and management. Mr. Thomas, 85% shareholder, officer, and director is proposed as full-time general manager and Mr. Dela Pena, 15% shareholder, officer and director is proposed as the full-time chief engineer. The positions of general manager and chief engineer are considered to be management level positions having policy functions. See *East St. Louis Broadcasting Co., Inc.*, 29 FCC 2d 170, 172 (1971) citing *Grand Broadcasting Co.*, 36 FCC 925, 930 (1964), decided before the adoption of the *Policy Statement*. AGR contends that Mr. Dela Pena's outside activities will interfere with his

commitment to work a minimum of 40 hours a week at the station. This contention is based solely on speculation and is rejected. It is true that at the present time Mr. Dela Pena's work as a consultant varies from week to week and may require him to work as much as 60 hours in any given week. However, Mr. Dela Pena has promised to reduce his consulting efforts in the event the VBC application is granted. He has stated his willingness to lose his clientele should it be necessary to allow him to meet his commitments to VBC. In addition, Mr. Dela Pena will receive less compensation initially from the station than he receives as a consultant. However, it is not unreasonable that Mr. Dela Pena is willing to make that sacrifice for an ownership interest. In addition, Mr. Dela Pena has demonstrated that he has sufficient income to support himself until the station produces income for its shareholders. VBC will receive 100% quantitative integration credit.

10. The quantitative attributes of VBC's integrated owners enhances its proposal. Specifically, VBC is enhanced because Mr. Thomas is a resident of Ventura, has participated in the community's civic affairs, and has previous broadcast experience. Also, Mr. Dela Pena has previous broadcast experience. In addition, VBC receives a plus credit for participation by a minority owner.

11. Under the Shearer proposal, Mr. Shearer will be a full-time employee serving as the general manager and sales manager of the proposed station. Dr. Logan-Shearer, his wife, is proposed as a part-time employee of the station. She plans to act as the Public Affairs Director and is proposing to work 20 hours a week. Shearer claims that it should receive credit for 100% full-time integration of ownership with management. Shearer asserts that since the application was filed under the joint tenancy laws of the state of California, Mr. Shearer must be considered to have 100% legal control of the station. As a result, it is argued, Mr. Shearer's proposed full-time management position entitles Shearer to 100% quantitative integration credit.

12. The Shearer claim to 100% full-time integration cannot be accepted. AGR and VBC dispute Shearer's intepretation of California law. They argue that there is no support for the theory that Mr. Shearer has 100% control or 100% ownership of the applicant. They argue under California law the rights of each spouse are identical, that neither Mr. Shearer or Dr. Logan-Shearer has a 100% ownership interest, and that each has a 50% ownership interest in the joint tenancy. It is unnecessary, however, to review California law since California law is irrelevant. Mr. Shearer can be regarded as the owner of the entire 100% interest for integration purposes only if the evidence establishes that was the intention of the Shearers. See *The New Continental Broadcasting Company*, FCC 81R–107, paragraph 15 (Rev. Bd. 1981). The record clearly establishes, however, that it was the intention of the Shearers that each would have a 50%

interest in the application. The Shearer application states that each will have a 50% ownership interest in the applicant. The Shearers testified that the application was accurate and that it was their intention and understanding that each would have a 50% ownership interest. Moreover, Dr. Logan-Shearer would have the authority to bind the joint tenancy and sign contracts on behalf of the joint tenancy. The Shearers clearly intend, and have testified, that Dr. Logan-Shearer will share decision making responsibility in managing the joint tenancy property. Thus, there is no support for Shearer's claim that Mr. Shearer should be regarded as the owner of the entire 100% interest. The cases cited by Shearer are factually distinguishable and do not support its argument. Unlike the present case, the wife in *New Continental* was not proposed for any involvement in the station, agreed to defer to her husband in all matters pertaining to the station, and her husband was to vote all the jointly held stock. In *East St. Louis Broadcasters, Inc.*, 19 FCC 2d 300, 346 (Hearing Examiner 1969), *affirmed*, 29 FCC 2d 170, 173–174 (1971), several shareholders held corporate stock in joint tenancy with their spouses. In each case only one spouse was proposed to be actively involved in station operations. Here, however, both Shearers will be actively involved in station affairs and view themselves as each owning 50% interest in the applicant. Similarly, in *Bie Broadcasting Co.*, 81 FCC 2d 40, 102–103 (Adm. L. J.), *reversed on other grounds*, 81 FCC 2d 1 (Rev. Bd. 1980), the wife was to have no active role in the proposed station. To the contrary, the husband, who was proposed as General Manager, made all managerial decisions regarding the stock in question. Furthermore, their decision to hold the stock as joint tenants was made solely for estate reasons. Indeed, all their investment property was held in joint tenancy so that the interests would automatically pass to the wife on death of her husband. The Shearers, on the other hand, own no other investment property in joint tenancy and have testified that estate planning played a minimal part in their decision to file as joint tenants.

13. Accordingly, for quantitative integration purposes, Shearer is entitled to 50% full-time integration credit and 50% part-time credit. Both Shearers will hold management level positions. Dr. Logan-Shearer's outside activities will not interfere with her commitment to work 20 hours at the station. She intends to retire from the daily practice of medicine. In addition, her business interests and other activities require only approximately 10–15 hours a month. The qualitative attributes of Shearer's integrated owners enhances its proposal. Specifically, Mr. Shearer has prior broadcast experience. In addition, Shearer receives a plus factor because of its minority owners.[3] The Shearers can not receive credit for local

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[3] AGR and VBC argues that their proposals to integrate Hispanic owners as opposed

residence and past civic participation. Neither Shearer has been a resident of Ventura or a member of a civic organization in that community. The Shearers reside in Los Angeles, California, which is outside the proposed station's service area. However, the Shearers intend to move to Ventura. Proposed future local residence is accorded less weight than residence of several years' duration. *Policy Statement, supra,* 1 FCC 2d at 396.

Other Comparative Factors

14. None of the applicants are entitled to a comparative coverage preference since there is essentially no difference in the areas or populations proposed to be served by AGR, VBC and the Shearers. In addition, each of the applicants receives a similar preference for proposing to install an auxiliary power generator.

Final Comparative Evaluation

15. AGR and VBC are entitled to 100% quantitative integration credit. Shearer is only entitled to 50% full-time integration credit and 50% part-time credit. The choice is, therefore, between AGR and VBC since it is settled that qualitative attributes of participating owners may enhance the value of an integration proposal but may not overcome a clear quantitative difference. *Van Buren Community Service Broadcasters, Inc.*, 87 FCC 2d 1010, 1022 (Rev. Bd. 1981).[4] The determination between the two applicants must be based on a comparison of the qualitative attributes of AGR's and VBC's integrated owners. Two of AGR's integrated owners, Mr. and Mrs. Sylvester, holding 84.5% of its stock can claim credit for local residence and participation in civic affairs. Mr. Thomas, VBC's integrated owner, and holder of 85% of its stock, can also claim such credit. The difference in stock holdings is *de minimus*. Mr. Thomas has been a resident of Ventura since 1974[5] while the Sylvesters have been residents since 1977. Since both have lived in Ventura for a considerable period of time, VBC will only receive a slight preference under the enhancing criterion of local residence. Neither AGR or

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to Shearers' proposal involving black owners is qualitatively superior since 12.2% of Ventura is of Hispanic heritage and only .9% are black. The contention is rejected since the presence of a significant black population is not an essential condition precedent to the award of comparative merit. *Waters Broadcasting Corporation*, FCC 81R–108, paragraph 16 (Rev. Bd. 1981).

[4] It should be noted that AGR's and VBC's proposals are qualitatively superior to that of Shearer. Shearer's proposal to integrate two minority owners is clearly superior to the proposed integration of minority owners by VBC and AGR. However, this advantage is outweighed by the fact that AGR and VBC are entitled to credit for local residence and participation in civic affairs. Shearer is not entitled to this credit. In addition, both AGR and VBC enjoy an advantage under the broadcast experience criterion. See *Waters, supra,* paragraph 18.

[5] Mr. Thomas has lived in Ventura and Ventura County for various periods between 1958 and 1974. However, he has lived continuously in the city only since 1974.

VBC enjoys a preference for past civic participation. Neither the Sylvesters or Mr. Thomas are or have been officer of a local civic organization. In addition, there appears to be no significant difference in the quality of their participation in local civic activities. VBC is entitled to a comparative preference for past broadcast experience. Both Mr. Thomas and Mr. Dela Pena have past broadcast experience. Only the Sylvesters, holders of 85.5% of AGR's stock, can claim such credit. Both Mr. Thomas and Mr. Sylvester have extensive broadcast experience. Mr. Dela Pena has also had considerable broadcast experience. However, the importance of such experience is diminished by the fact that it has been restricted primarily to engineering work. On the other hand, while Mrs. Sylvester's involvement in broadcasting has spanned far less years than Mr. Dela Pena, her experience has involved many more aspects of broadcasting, particularly at WGRY. For these reasons, VBC only enjoys a slight comparative preference under the broadcast experience criterion.[6] However, VBC's slight advantage under the local residence and broadcast experience criteria are outweighed by other factors. AGR is entitled to enhancement credit for female ownership (49%) while VBC is not. In addition, AGR and VBC both propose minority ownership and are entitled to a plus factor for minority preference.[7] However, Ms. Lara's position as director of public affairs and as assistant program director is considerably more important than Mr. Dela Pena's position as chief engineer. *East St. Louis, supra*; *Grand, supra*. Further, it is clear that Mr. Dela Pena will be required to spend very little time as chief engineer and that most of his time will be spent performing non-management functions. Thus, in assessing the quality of Ms. Lara's proposed integration as opposed to Mr. Dela Pena's proposed integration, AGR is entitled to a substantial comparative preference because of its superior intergration proposal.[8] It is therefore concluded that a grant of AGR's application will better serve the public interest, convenience and necessity.

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[6] As discussed, *supra*, broadcast experience is deemed to be of only minor significance.

[7] Ms. Lara will have a 15.5% stock interest and Mr. Dela Pena will be a 15% shareholder.

[8] VBC citing *East St. Louis* and *Grand* argues that it should be accorded a substantial comparative preference because it proposes to integrate an 85% shareholder into the position of general manager while AGR proposes to integrate a 51% shareholder into that position. The cited cases are factually distinguishable. Grand involved a comparison of proposals where the ownership interests of the proposed general managers varied from 6.50% to 20% and no integrated owner held a controlling stock interest. East St. Louis involved a situation where a 5.59% stockholder, proposed as general manager with broadcast experience, would be the only owner integrated full-time into the operation of the station and where no stockholder held a controlling interest. Here, on the other hand, Mr. Sylvester and Mr. Thomas, both experienced broadcasters who will act as general manager, have a controlling stock interest and will be in control of the day-to-day operation of the proposed station. The fact that Mr. Thomas has a greater stock interest is, therefore, inconsequential.

Accordingly, IT IS ORDERED, That unless an appeal from this Initial Decision is taken by a party or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the rules, the application of Absolutely Great Radio, Inc. IS GRANTED and the applications of Ventura Broadcasting Co. and William Shearer and Arike Logan-Shearer, Joint Tenants ARE DENIED.[9]

JOSEPH CHACHKIN, *Administrative Law Judge,*
FEDERAL COMMUNICATIONS COMMISSION.

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[9] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Common Carrier, Computer II
Deregulation
Disabled Persons, Customer Premises Equipment
Subsidiary, Separate

Petitions filed for waiver of Computer II rules granted so that telephone companies could tariff specialized CPE needed by disabled persons to communicate. The separate subsidiary requirement was waived so that the BOCs could provide specialized CPE for the disabled on an unseparated basis for one year. –*AT&T Co.*

FCC 82–580

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
AMERICAN TELEPHONE & TELEGRAPH COMPANY
ORGANIZATION FOR THE USE OF THE TELEPHONE
Petitions for Waiver of Section 64.702 of the Commission's Rules so that the Bell Operating Companies and other local telephone companies may provide under tariff new CPE to meet the needs of disabled persons

MEMORANDUM OPINION & ORDER

Adopted December 22, 1982; Released January 25, 1983

BY THE COMMISSION:

I. Introduction

A. *Background*

1. In the Second Computer Inquiry (Computer II)[1] the Commission concluded that, as of January 1, 1983, all common carriers must

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[1] Second Computer Inquiry (*Final Decision*), 77 FCC 2d 384, *recon.*, 84 FCC 2d 50 (1980) (*Reconsideration*), *recon.*, 88 FCC 2d 512 (1981) (*Further Reconsideration*), *aff'd sub nom.* Computer and Communications Industry Association v. FCC, No. 80–1471 (D.C. Cir. November 12, 1982).

provide new customer premises equipment (CPE) only on a detariffed basis.[2] "Embedded" CPE, i.e., CPE on a customer's premises or in inventory as of January 1, 1983, may continue to be offered under tariff until the manner of its detariffing is determined in the *Implementation Proceeding,* CC Docket No. 81–893.

2. AT&T and its affiliates may sell new CPE only through a separate subsidiary once the Commission has approved the form of the capitalization requested for the subsidiary. On November 4, 1982, we approved, with modifications, AT&T's capitalization plan for the provision of new CPE by American Bell, Inc. (AmBell). *CPE Capitalization Order*, FCC 82–496, released November 10, 1982. AT&T has designated AmBell as the Bell System provider of new CPE to domestic end users.[3] All common carriers other than AT&T and its affiliates must keep books of account and records for the provision of new CPE separate from regulated records. Under the Computer II rules, these carriers are not required to form separate subsidiaries for the offering of CPE.

B. *Petitions for Waiver*

3. Two petitions for waiver have been filed which deal with similar subject matter, one by AT&T and one by the Organization for the Use of the Telephone (OUT). On October 22, 1982, AT&T filed a petition for waiver of the Computer II rules to permit the Bell Operating Companies (BOCs) to provide new CPE, under tariff, to meet the special needs of the disabled. AT&T seeks the waiver only on an interim basis until embedded CPE is detariffed pursuant to the *Implementation Proceeding*. Thereafter, AT&T states, AmBell will assume the BOC's responsibilities with respect to the provision of CPE for the disabled.

4. AT&T contends that a single point of contact within its operating companies is necessary to meet the requirements of the disabled for both communications service and equipment. Without the instant waiver, AT&T argues, a BOC may be unable to respond

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[2] "New CPE" is customer premises equipment which is neither in inventory nor subject to the jurisdictional separations process, and is offered to customers after January 1, 1983. *Reconsideration*, 84 FCC 2d 50, 66–67 (1980); *Order on Further Reconsideration*, 88 FCC 2d 512, 525–27 (1981). CPE "includes all equipment provided by common carriers and located on customer premises except over voltage protection equipment, inside wiring, coin operated or pay telephone and multiplexing equipment to deliver multiple channels to the customers." *Reconsideration*, at 61 n.10.

[3] In accord with the Consent Decree entered by Judge Greene in United States v. Western Electric, No. 74–1698 (D.D.C., August 24, 1982), the BOCs will be allowed to market new CPE after their divestiture, although whether they will be required to form separate subsidiaries pursuant to section 64.702 of the Commission's Rules has not yet been determined. *See* Petition for Declaratory Ruling filed on November 30, 1982 by North American Telephone Association seeking a ruling as to whether the BOCs, following their divestiture, will be subject to the Computer II separation requirements.

fully to a request from a disabled person because its embedded inventory is limited. Rather, the customer would have to be referred elsewhere, complicating and delaying the resolution of the disabled person's telecommunications problem. Those complications would be particularly problematic, AT&T contends, where "special assemblies," i.e., reconfigured arrangements of terminal equipment, must be assembled in a customized fashion to meet the needs of a particular customer. Furthermore, AT&T represents that persons presently employed at the BOCs have specialized knowledge necessary to resolve the unique telecommunications problems of the disabled.

5. AT&T states that the instant waiver would not adversely affect the Commission's bifurcation approach to deregulating CPE or adversely affect either ratepayers or AT&T competitors. AT&T states that only sixty thousand orders are received yearly for equipment to meet the needs of the disabled, whereas several million requests are received annually for all types of CPE. AT&T limits its waiver request to equipment which is required to meet the special needs of the disabled. AT&T proposes to use a "self-certification" method to assure that only the disabled use the BOCs to secure both communications services and equipment. In other words, if customers state that they are disabled, appropriate equipment will be provided. AT&T states that such a self-certification approach works well in the context of other programs, *e.g.*, directory assistance charge plans where persons who are disabled are not charged for assistance if they identify themselves as disabled.

6. OUT filed a petition for waiver on November 5, 1982 on behalf of all independent telephone companies to extend AT&T's petition for waiver of Computer II to permit all independent telephone companies to provide new CPE under tariff to meet the needs of the disabled. OUT sought this waiver on a permanent, rather that on an interim, basis. OUT argued that, because there is ineffective competition in the market for CPE for the disabled, the disabled would be deprived of communications equipment at reasonable prices absent the grant of the waiver. In addition, OUT suggested that, with equipment for the disabled, we are improperly using our authority to preempt state action, contrary to our decisions and in violation of the Communications Act of 1934.

C. *Comments of the Interested Parties*

7. The issues involved with AT&T's and OUT's waiver petitions are similar. Therefore, all comments received will be deemed to have been filed with respect to both petitions. Generally, the commenting parties support AT&T's and OUT's petitions for waiver. The comments received are from The Michigan Public Service Commission (Michigan), the American Speech-Language-Hearing Association, the Communications Workers of America (CWA), General

Telephone & Electric, Co. (GTE), National Association of Regulatory Commissioners (NARUC), California Association of the Deaf, Krown Research, Inc. and a joint comment filed by Crest Industries, Inc., Tone Commander Systems, Inc. and Valcom Corp. (hereinafter Crest Comments). Letters received from the American Deafness and Rehabilitation Association and Joseph B. Szczepaniak III supporting AT&T's waiver request will be treated as informal comments.

8. NARUC and Michigan stated that they oppose AT&T's petition only insofar as the petition requests a waiver on an interim basis. They believe that a permanent waiver of Computer II should be granted to permit the continued tariffing of equipment for the disabled.

9. GTE believes that there is no need to permit the BOCs to offer detariffed equipment for the disabled under tariff. GTE would rather the Commission waive Computer II only insofar as it requires the BOCs to offer equipment for the disabled through a separate subsidiary. In comments filed with respect to OUT's petition, GTE saw no reason for a waiver to be filed on behalf of independent telephone companies since they presently are not required to form a separate subsidiary for the offering of any new CPE.

10. United Telephone System, Inc. (UTS) and Centel Corp. (Centel) also argue that the continued tariffing of CPE for the disabled is unnecessary. UTS and Centel state that a competitive market will best serve the needs of the disabled.

11. The Crest Comments, in addition to approving of AT&T's waiver petition, ask the Commission, *sua sponte*, to broaden the waiver request to include "specific product markets and geographical areas and . . customer classes which the individual BOCs determine would not be adequately served either by American Bell or by competing providers of CPE products and services." Crest Comments at 2. The comments request that the BOCs be permitted to offer such equipment under tariff.[4]

12. In reply comments filed with respect to OUT's petition, AT&T contends that the Commission should not grant the waiver on a permanent basis. AT&T argues that there is no need in this proceeding to consider whether any waiver should be permanent and that any long term needs of disabled persons for CPE can be met by a competitive marketplace.

II. *Discussion*

13. On January 3, 1983 Public Law 97–410, the Telecommunications for the Disabled Act of 1982, was enacted. Among the

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[4] The expansion of AT&T's waiver which the Crest Comments seek raises different issues from those involved with the provision of CPE to meet the needs of the disabled. Therefore, we decline the request to expand the present proceeding beyond the issues involved in AT&T's and OUT's petitions.

provisions of that bill, section 610(g) is added to the Communications Act of 1934. Section 610(g) provides:

> Any common carrier or connecting carrier may provide specialized terminal equipment needed by persons whose hearing, speech, vision, or mobility is impaired. The State commission may allow the carrier to recover in its tariffs for regulated service reasonable and prudent costs not charged directly to users of such equipment.

That section in effect requires an amendment to Computer II to permit all carriers to provide "specialized equipment needed by persons whose hearing, speech, vision, or mobility is impaired."

14. The Act also provides that, under rules to be adopted by the Commission within one year, state commissions have authority to permit carriers to recover the reasonable costs of providing specialized equipment needed by disabled persons from basic service ratepayers. The act itself does not define the term, "specialized equipment" needed by disabled persons. The legislative history of the Act includes within that term not only equipment specifically designed for use by the disabled, but also some optional features, such as speakerphones, which are also useful to other persons. *See* H. Rep. 97–888, 97th Cong., 2d Sess., at 13 (1982) (H. Rep.). During the course of the debate on this legislation, the sponsor of the bill stated that the Commission has the discretion to define the term "specialized equipment" needed by the disabled. 128 Cong. Rec. H9484 (Daily Ed., December 13, 1982).

15. We will not attempt at this point to define in detail the term "specialized equipment" needed by disabled persons. Rather, we shall address this issue within the context of the rulemaking proceeding we are required to conduct pursuant to the terms of the Act.[5] Nonetheless, prior to reaching a decision in that rulemaking proceeding, some guidance would, we believe, be helpful. The term "specialized equipment" obviously includes equipment which is specially designed for use by a person with a speech, hearing, sight or mobility impairment. Examples of such equipment are amplified hearing handsets and teletypewriters for the deaf. On the other hand, it would appear clear from the legislative history of the Disabled Act that basic equipment such as push button telephones or telephones with lighted dials which may be incidentally useful to disabled persons clearly does not fall within the intended meaning of "specialized equipment." Between these two extremes exists equipment which can be used both by the population at large and by disabled persons. Whether or not particular equipment is within the meaning of the Act can best be decided on a case-by-case basis

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[5] The statutorily mandated rulemaking proceeding requires that we address additional issues. Those issues will be announced in the Notice of Proposed Rulemaking to be issued in the near future.

pursuant to standards defined in the rulemaking proceeding conducted pursuant to the Act. Until a decision is reached in the rulemaking proceeding, the term "specialized equipment" for the disabled shall include CPE which has as at least one of its important purposes specialized application enabling disabled persons to communicate. The House Report uses as an example of equipment within this category speakerphones for those with impaired mobility. We also find that the term "specialized equipment" includes "special assemblies" which comprise special configurations of CPE to meet the telecommunications needs of a disabled customer.

16. Before addressing the changes required by the legislation, we also believe it appropriate to consider whether some accommodations should be made under our Computer II rules to allow any telephone company to provide advice and assistance to disabled or hearing impaired persons with respect to the availability of various CPE configurations that may be used by such persons. In general, the Computer II decisions establish the principle that the provision of CPE is not a common carrier communications service. As such, activities associated with the marketing and provision of such equipment are to be conducted separate from the provision of local exchange service.[6] AT&T must do this through a separate subsidiary. States are precluded from requiring local carriers to undertake any activity which is inconsistent with our Computer II determinations. To the extent that the BOCs provide disabled persons with information concerning new CPE, this could be construed as prohibited by virtue of the structural separation requirement for marketing new CPE. We conclude, however, that a limited exception should be made whereby the BOCs are not precluded from advising or otherwise informing disabled persons as to the availability of specialized CPE, or CPE components, vendors of such equipment, and prices charged in the marketplace for such equipment.

17. Bell System carriers currently have a centralized contact point where disabled persons can obtain information concerning the availability of specialized CPE. We do not believe that Computer II should be construed to preclude any telephone company from disseminating information concerning CPE that may be of utility to disabled persons, or to otherwise preclude states from requiring local telephone companies to maintain this public service. We conclude, therefore, that our Computer II decision does not preclude this activity on the part of any carrier, including the BOCs.

18. The Telecommunications for the Disabled Act of 1982 requires that we alter two aspects of the Computer II decisions until a final decision has been reached in the required rulemaking proceeding. First, Section 610(g) requires that we permit carriers to

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[6] This applies to new CPE as of January 1, 1983. We are addressing the manner and timing for the detariffing of embedded CPE in the *Implementation Proceeding*.

provide specialized equipment needed by disabled persons. Presently, the BOCs may not offer any new CPE because they have not formed separate subsidiaries as required by the Computer II rules. Because adherence to the structural separations requirements would effectively prohibit the BOCs from providing specialized equipment needed by disabled persons, we will waive the Computer II separation requirement with respect to the provision of specialized CPE needed by disabled persons.

19. The second change required in the interim is to permit carriers to provide specialized equipment needed by disabled persons under tariff. The Act itself is silent on the question of whether or not this CPE may be tariffed. However, the legislative history states that "As a result of this legislation, it will be permissible to offer such equipment under tariff or on a *deregulated basis* . . . ." H. Rep. at 14 (emphasis added). The choice of whether to tariff or not tariff thus appears to rest, at least in the first instance, with the carrier. Accordingly, we are granting a waiver to the extent that we shall not preclude the BOCs or any other telephone company from offering such CPE on a tariffed basis. In taking this action we do not decide whether new CPE for the disabled shall in fact be offered under tariff or be required by states to be offered under tariff.[7] We are merely carving out a limited exception to a federal mandate that requires new CPE to be offered on a nontariffed basis consistent with the terms of legislation.

20. Finally, as mentioned above, AT&T has proposed to adopt a "self-certification" program pursuant to which it will provide specialized equipment to persons who say that they are disabled. At this point we take no position as to whether the arrangement is satisfactory or whether additional verification can or should be required. Until we can address this matter further in the rulemaking mandated by the Disabled Act, we leave it to state commissions to decide whether or not AT&T's self-certification approach is satisfactory.

III. *Ordering Clause*

21. Accordingly, IT IS ORDERED that pursuant to sections 4(i), 4(j) and 610 of the Communications Act of 1934 a waiver of Section

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[7] The legislative history to the Act is unclear as to whether we must permit state commissions to force carriers to offer under tariff specialized equipment needed by disabled persons. The House Report reads in relevant part:

> In light of the record of voluntary cooperation by the industry, the Committee found it unnecessary specifically to address the possibility of a "recalcitrant carrier" that might decline to participate in a program of subsidized offerings sanctioned by the State Commission . . . . These matters may be considered, if necessary, in formulating the required modifications to *Computer II*.

H. Rep. at 14.

64.702 of the Commission's Rules and Regulations, 47 C.F.R. §64.702, IS GRANTED as follows:

1. **The Bell Operating Companies may offer on an unseparated basis new specialized CPE needed by persons whose speech, hearing, sight or mobility is impaired.**
2. **All telephone companies may offer under tariff new specialized CPE needed by persons whose speech, hearing, sight or mobility is impaired.**

FEDERAL COMMUNICATIONS COMMISSION,
WILLIAM J. TRICARICO, ***Secretary.***

Common Carrier, Interconnection, Customer-Provided Equipment
Common Carrier, Like Services
Common Carrier, Service, Duty to Furnish
Service, Need for Tariff
Voice grade Channel

AT&T directed to file tariffs making group (48kHz) and supergroup (240kHz) channels available to other common carriers and the public under a general rate schedule. Further comments requested re: feasibility of using existing facilities for local distribution portion of channels and whether transmission components can be used for wideband services.
-*AT&T Co.*
Docket No. 21499

FCC 83-39

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMERICAN TELEPHONE AND TELEGRAPH COMPANY Offer of Facilities to Other Common Carriers	Docket No. 21499

MEMORANDUM OPINION AND ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING

(Adopted: January 27, 1983; Released: February 15, 1983)

BY THE COMMISSION:

1. On January 19, 1981 the Commission released a Notice of Inquiry and Proposed Rulemaking in this proceeding to examine whether the American Telephone and Telegraph Company (AT&T) should be required to offer group and supergroup facilities to other common carriers (OCCs) and to the public.[1] For reasons stated below, we order AT&T to make these facilities available to the OCCs and

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[1] American Telephone and Telegraph Company, 84 FCC 2d 1 (1981). Subsequent to the issuance of the Notice and receipt of comments, AT&T by letter to the Commission indicated a willingness to file a tariff providing group and supergroup facilities to the public on a general basis during the second quarter of 1982. *See* letter of W. E. Albert, AT&T, to Secretary, FCC, March 12, 1982. The letter, however, did not address many of the issues raised by the record in this proceeding to date. We therefore think it advisable to go forward so that our order may provide guidance to AT&T in any group and supergroup tariff filing it may make in the

the public, subject to certain limitations, and seek further comments on related issues.

Background

2. The OCCs and, in some instances, the public, frequently have requirements to transmit bulk communications from one location to another. These bulk communications may be in the form of analog or digital signals or a combination of both, the volume of which may be equivalent to the information carried by several voice grade channels. It is a common practice in the communications industry, where there is a need for a large number of circuits over a common communications path, to employ multiplexing equipment for this purpose. Multiplexing equipment can be of either frequency division (analog) or time division (digital) type (FDM and TDM, respectively). Digital information may be transmitted over analog facilities or vice versa, provided an analog to digital or digital to analog conversion is made. The frequency division multiplex hierarchy in common use (L multiplex) begins with the combination of twelve voice band channels into a circuit or base group; it occupies 60–108 kHz of spectrum at the first hierarchical step in AT&T's transmission plant. The next step in the hierarchy combines five groups into one supergroup, which occupies a bandwidth of 240 kHz in the transmission plant. The time division multiplex hierarchy in common use (T 1 multiplex) begins with the combination of 24 64 kbps digitized voice channels. Each channel is capable of supporting telephone grade voice communication on a 1.544 Mbps bit stream commonly referred to as the DS-1 rate.[2] The next step in the hierarchy is a combination of 4 DS-1 channels into a 6.3 Mbps bit stream commonly referred to as the T 2 carrier system. *See Engineering and Operations in the Bell System*, Western Electric Co., Indianapolis, Indiana, 1978 at 149–154. AT&T facilities currently employ both analog and digital transmission systems. Local and intracity carrier facilities are predominantly digital, requiring time division multiplexing, whereas intercity transmission is predominantly analog, using frequency division, but may become increasingly digital, especially as fiber optic systems are added.

3. As we explained in the Notice, the group or base group and the supergroup or basic supergroup are analog channels with nominal bandwidths of 48 kHz and 240 kHz respectively. Each of these channels constitutes a fundamental building block in the FDM channel hierarchy, designed principally to satisfy voice-grade telephone channel requirements. In the ordinary mode of use, a group channel is used to transport bundles of up to twelve (12) nominal 4

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future.

[2] We are aware that there are subhierarchies such as the T 1C; the latter operates at a rate of 3.152 Mbps.

kHz voice channels and supergroups are used for bundles of up to sixty (60) voice channels. In addition to their basic telephone message service roles, we pointed out in the Notice that groups and supergroups have been used in various ways to fulfill private line service requirements. For one, both groups and supergroups are used to provide wideband[3] services operating at data transmission rates of up to 230.4 kbps under AT&T Tariff FCC Nos. 258 and 260. Since these will be discussed in further detail below, suffice for present purposes to say that groups and supergroups comprise the intercity or long-haul transmission vehicle for particular wideband signals. These groups and supergroups are in turn connected to customer-designated locations through the use of existing local distribution plant, with special conditioning[4] added as required. In such cases, the full 48 kHz or 240 kHz bandwidth used for interoffice transmission is not available at the customer's location, but rather in most cases only the necessary bandwidth required by the specific data set or data modem is made available. In those instances, the data sets and modems, by various internal processing techniques, compensate for bandwidth deficiencies. Where AT&T presently provides wideband services under its tariffs, it in all cases requires the use of AT&T modems and associated data sets.

4. In addition to wideband services, AT&T has variously provided groups and supergroups to common carriers having need for access to the full group or supergroup carrier system bandwidth *i.e.*, 48 kHz or 240 kHz. These latter arrangements, which we will subsequently term full carrier systems offerings,[5] have up to now required specially constructed local distribution channels capable of transporting the full carrier system group or supergroup baseband signal to the customer location. These latter services, typified by the offering to domestic satellite carriers (Domsats) under Tariff 265 and the previous offerings to the Western Union Telegraph Company under contract, can be multiplexed by customers into any combina-

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[3] The term wideband is used here to describe a service arrangement which employs facilities of the group and supergroup type for the long-haul or intercity transmission of signals requiring greater than analog voice channel capacity. Generally, specialized customer premises and central office station terminal equipment is required to convert and maintain the wideband information into a form suitable for transmission over the existing intercity group or supergroup channels.

[4] By the term special conditioning we refer to the modification or special selection of local distribution channels to meet specified electrical criteria. This can include selection of specially insulated or physically isolated wire pairs, frequency delay equalization, improving the signal to noise performance, or removing loading coils so as to avoid distortion of digital (PCM) signals.

[5] The term "full carrier system" as used here means the amount of carrier system spectrum or the specific bandwidth slot used to carry group or supergroup channels. It does not, therefore, designate an entire carrier system.

tion of subchannels up to the maximum bandwidth or can be used in unsubdivided form to carry wideband signals.

5. In the Notice we recognized that a number of carriers have requested group and supergroup facilities from AT&T. We observed that AT&T's present and past group and supergroup offerings, discussed above, have been limited to particular uses or applications or particular customer groups. Specifically, under Tariff 260 AT&T offers Series 8000 wideband services which use group channels for intercity transport. These wideband services are packaged, as already noted, to require the use of AT&T-provided data terminal equipment and thus, the group channels and associated local distribution channels are not available separately; *i.e.*, in an unbundled form. This same is true for supergroup-based wideband services provided under Tariff 258. Full carrier system group or supergroup services, on the other hand, have been offered only to a limited number of common carriers either under contract *i.e.*, to Western Union and the International Record Carriers (IRCs), or under tariff *i.e.*, to the Domsats under Tariff 265,[6] *supra*.

6. We then observed that removal of the various restrictions in Tariffs 258, 260 and 265 which limit the present group and supergroup-based offerings could in and of itself result in general availability to all customers of the desired channels. Consistent with previous investigations,[7] we placed the burden of justifying these restrictions on AT&T. Thus, the carrier was required to show that such restrictions are necessary to achieve a permissible end; that they accomplish that end in a reasonable manner; and that the restrictions are not so broad as to infringe unduly on protected customer conduct.

7. The impact of removing existing restrictions would essentially result in the unbundling of Tariff 258 and 260 services and deleting the provisions which limit Tariff 265 services to Domsats. As noted above, AT&T, under its present wideband service offerings, is able to use group and supergroup channels in concert with voice-grade local distribution plant, conditioned or modified as may be necessary, for data transmission up to speeds of 230.4 kbps. In so doing, it provides data modems and associated data sets located at both the customer premises and telephone company central offices which serve the various customer premises. The modems located at customer prem-

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[6] Under Tariff 265, AT&T offers supergroup or mastergroup (equivalent to 600 voice channels) facilities to domestic satellite common carriers on a specially constructed basis, with charges listed in the tariff on a case by case basis. These supergroup or mastergroup facilities will upon request be further multiplexed; *e.g.*, into group channels, by AT&T. Since our interest here is limited to groups and supergroups, any discussion of Tariff 265 should not be viewed as affecting the current limited availability of mastergroups.

[7] *See, e.g.*, AT&T Restrictions on Interconnection of Private Line Services, 60 FCC 2d 939 (1978).

ises operate in tandem, or back-to-back, with the matching central office modems.[8] Through such as arrangement, the local distribution wire pairs, whose electrical characteristics vary from one to another, can be conditioned, or the variations effectively neutralized, so that a uniform set of interface characteristics can be presented to the long haul or intercity transmission plant. By unbundling such wideband service arrangements in Tariffs 258 and 260, each service element—*i.e.*, the local distribution channel, long-haul group or supergroup channel (called interexchange channel in the tariff) and the data set equipment—would be expressed separately in the tariff rather than being grouped together under single charges. In this way, potentially at least, a customer would be able to obtain either the same arrangement as at present or only a part of that arrangement, viz., the local distribution and interexchange channel, without AT&T provided equipment. Since AT&T successfully employs existing local distribution plant to provide wideband group and supergroup-based service, we assumed in the Notice that customers, too, would find such facilities useful without need for special construction of local channels.

8. Given the current limited tariff availability of these channels in the face of expressed demand, we decided to investigate whether the public interest would be served by allowing access to group and supergroup offerings on an unrestricted tariff basis. We decided to include within the scope of the investigation the question of whether other users apart from common carriers have a need for these channel types as well.

9. In addition to AT&T, both carriers and other users of AT&T communication services have responded to the Notice. Every commenter, save AT&T, supports proposals to make groups and supergroups available both to the OCCs and other users. Thus, the Federal Executive Agencies point out that the availability of group and supergroup facilities could "significantly enhance the national security and emergency preparedness posture of the nation."[9] Citicorp asserts that availability of these facilities would ultimately reduce the cost of providing financial services to the consumer.[10] Indeed, many commenters echo the Commission's tentative conclu-

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[8] The central office modem essentially regenerates the signal originated at the customer premises modem, alleviating many of the problems associated with signal degeneration and noise accumulation. Such regeneration, which effectively cleanses the data signal, would not be possible to accomplish from the customers' premises alone.

[9] *See* Comments of the Federal Agencies at 3. The Executive Agencies assert that an important national security telecommunications principle is to ensure that interconnection take place between all interstate common carrier telecommunications networks so as to facilitate interoperation in case of any national emergency.

[10] *See* Comments of Citicorp at 2.

sion that public benefits would result from the ability to obtain groups and supergroups from AT&T on a general basis.[11]

Discussion[12]

10. As explained, we have called upon AT&T to justify the tariff provisions by which existing group and supergroup offerings are restricted in various ways. Under the well-established principles of our *Carterfone* decision, 13 FCC 2d 420 (1968), *recon. den.* 14 FCC 2d 605 (1969) a customer has the right to use his communication service in ways which are privately beneficial but not publicly detrimental. There is little doubt from the record that the availability of groups and supergroups would benefit members of the using public. Thus, the first portion of the *Carterfone* test is unquestionably met.[13] In the Notice we also observed that AT&T had refused requests by some customers for groups and supergroups and decided to consider whether these refusals were justified. Notice at para. 19. Accordingly, we now focus on AT&T's claim that the public interest does not require it to make such facilities available to the public.

Nominal vs. Useful Bandwidth

11. AT&T initially asserts that the Notice was incorrect in its underlying assumption that the unbundling and concomitant elimi-

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[11] *See, e.g.*, Comments of Western Union at 3: "As a general matter, wideband analog facilities such as groups and supergroups provide the competing carrier with the greatest flexibility in its development of innovative and/or cost-effective value added offerings to the consuming public. With wideband channels, the competing carrier can meet the challenge of doing it better, cheaper, and/or differently. The availability of innovative modems, multiplexers, data in voice (DIV) units, etc. produced by an ever-growing and creative electronics industry, can be connected to the wideband resource to provide the public with an increasing variety of technological alternatives . . ."

[12] We note preliminarily AT&T's argument that an evidentiary hearing is required given the alleged material factual disputes over the nature of existing services, the extent of need for groups and supergroups, and the technical and economic feasibility of group/supergroup offerings. We disagree. We view this proceeding as essentially similar to the interconnection disputes between AT&T and other common carriers in Bell System Tariff Offerings, 46 FCC 2d 413 (1974) and the Commission's proceedings which decided the validity of AT&T's tariff restrictions on resale and sharing of its private line services. Resale and Shared Use, 60 FCC 2d 261; *recon.* 62 FCC 2d 588 (1977). On appeal from these decisions the courts held that no evidentiary hearing was necessary. *See* Bell Telephone Company of Pennsylvania v. FCC, 503 F.2d 1250 (3d Cir. 1974), *cert. denied* 422 U.S. 1026 (1975), *reh'g denied* 432 U.S. 886 (1975); AT&T v. FCC, 572 F.2d 17 (2d Cir.) *cert. denied* 439 U.S. 875 (1978). *See also* Western Union Telegraph Company v. FCC, 665 F.2d 1126 (D.C. Circuit, 1981), (evidentiary hearing not required before the Commission could order the IRCs to unbundle their telex terminal equipment from their transmission facilities).

[13] *See, e.g.*, Appendix A, which shows the benefits which could be achieved.

nation of certain tariff restrictions would result in group and supergroup channels being made available to the public.[14] According to AT&T, where 50, 56 and 230.4 kbps services are provided on an analog route, the group and supergroup frequency spectrums are not actually delivered to the customer's premises. Rather, it points out, the frequency spectrum used for 50 and 56 kbps transmission is approximately 1 kHz to 37 kHz, and for a 230.4 kbps signal, approximately 1 kHz to 190 kHz. AT&T notes that the full 48 kHz and 240 kHz signals do not appear at the customer premises nor is any transmission possible in the 60-108 kHz or 312–552 kHz frequency ranges which are used in the long haul carrier systems to transmit groups and supergroups, respectively. Thus, the argument appears to run, because the entire 48 kHz and 240 kHz group and supergroup bandwidths are purportedly unavailable at the customer's premises, they would not be useful to the public.

12. AT&T, however, reads the Notice too narrowly. The Commission did not assume, as AT&T alleges, that the full 48 kHz and 240 kHz baseband multiplex frequencies of group and supergroup channels would in all cases be made available at the customer's premises. In the Notice, rather, we described groups and supergroups as having *nominal* bandwidths of 48 kHz and 240 kHz within the standard meaning of that term. *See* Notice at n.3. The term "nominal", when used with a bandwidth designation, means the entire bandwidth occupied by a channel, and is not necessarily equivalent to the "useful" bandwidth realized at the customer's premises.[15] As noted *supra*, in the case of wideband service, the full carrier system group or supergroup spectrum is generally not delivered to the customer's location, whereas it is in the case of full carrier system services, such as those offered under Tariff 265. We did not, therefore, assume that AT&T would routinely deliver this full carrier system bandwidth to all customers by the simple unbundling of terminal equipment, and our inquiry concerning the desirability of a group and supergroup channel offering does not turn on this issue.

13. However, we recognize that in certain instances, particularly those involving service provided to OCCs, the full group or supergroup carrier bandwidth would be needed at the customer's premises. Put in other terms, the local distribution channel in such cases would have to be capable of carrying the basebands of groups and supergroups *i.e.*, 48 kHz and 240 kHz,[16] respectively, to the custom-

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[14] AT&T Comments at 4, 9–11.

[15] *See, e.g.*, definitions of "bandwidth, nominal" and "useful bandwidth" in Emerson C. Smith, Glossary of Communications (Chicago: Telephony Publishing Co., 1971) at pp. 28 and 448.

[16] As we noted above, the first step in the Frequency Division Multiplexing (FDM) hierarchy in the Bell System involves a combination of twelve voice channels into a circuit group, which is the basic building block of that hierarchy. The frequency

er's premises so that direct access to the intercity carrier systems would be possible. As pointed out in the Notice, AT&T has offered or provided such facilities to the Western Union Telegraph Company and the IRCs pursuant to contract, and to the Domsats pursuant to tariff. (As noted earlier, we refer to this arrangement as a full carrier system service.) In other cases, we envision customer requirements for group and supergroup-based services similar to those now provided under Series 8000 in AT&T Tariff FCC No. 260 and the 230.4 kbps data channels provided under AT&T Tariff FCC No. 258. (As noted, these latter arrangements where the full carrier system spectrum of frequencies does not have to be delivered to the customer's premises are referred to as wideband services.)

14. AT&T appears to assert, however, that provision of the full carrier system 48 kHz and 240 kHz channel services would prove impractical from a technical, financial and economic point of view because of purported difficulties that would be encountered in local distribution of these channels and the development of necessary interface specifications. Thus, it states that the provision of group or supergroup analog carrier facilities to a customer location would involve special construction in almost every case. As for wideband group and supergroup channels, it states that the unbundling of the data set from present group and supergroup based data offerings would result in offerings of wideband channels of 1-37 kHz and 1–190 kHz and that such unbundling would not produce a channel of significant practical value. It proposes instead to make other types of channels available for these purposes. As will be shown, however, there appears to be little support in the record, the literature, or in our experience with current and prior AT&T service offerings that would justify a finding that the offering of groups and supergroups is generally impractical.

15. That the provision of group and supergroup channels is both possible and practicable is supported by the record. Southern Pacific, for example, notes that AT&T has

> avoided any mention of the Wire Line Entrance Link (WLEL) that today is used to interconnect facilities—both voice and television —at 70 MHz. This is a far higher bandwidth than the 10 kHz that AT&T implies is the highest that it can provide for interconnection. Both AT&T and the OCCs currently use 70 MHz WLEL interconnection technology for cable interconnections up to several miles in length. Additionally, AT&T fails to acknowledge that low capacity

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band occupied by a twelve channel group is 60 to 108 KHz. The next step in the FDM hierarchy is the combination of five groups into a sixty channel supergroup occupying the band from 312 to 552 KHz.

> microwave systems are available for use as group and supergroup interconnections.[17]

The existence of WLELs and low capacity microwave, then, indicates that there may well be alternatives to special construction for the local distribution of full carrier system group and supergroup services where there is a customer requirement for interconnection with the entire group or supergroup bandwidth.

16. As additional support for our finding that there are means other than special construction which AT&T could use to efficiently accomplish local distribution, we need look no further than the record compiled to date in our ongoing investigation of AT&T's Series 7000 terrestrial television program transmission service.[18] There, AT&T's claimed investment for Series 7000 includes $29.7 million in polyethylene shielded video (PSV) cable pairs that are no longer used for the provision of program transmission service.[19] PSV cable pairs are designed for the local distribution of wideband TV program transmission service. AT&T states that these PSV cable pairs are contained in composite cables with in-service exchange cable pairs and were placed in service by the Bell Operating Companies over the years based on purportedly valid engineering and cost considerations. It further states that "utilization of these presently unneeded facilities for future private line application is being explored."[20] It follows that one alternative use which could be considered for these facilities previously used for the handling of nominal 6 MHz signals is group and supergroup transmission at nominal 48 kHz and 240 kHz, respectively. While it may be that PSV cable pairs are not in every instance available in locations where customers would desire group or supergroup spectrum capacity, we may nevertheless assume from the large amount of investment attributed by AT&T to PSV cable pairs unused for TV transmission service that many shielded high capacity local cable pairs are available for other applications. While we recognize that PSV cable pairs may prove unsuitable for conversion to group or supergroup applications, to date, AT&T has not addressed this matter in its

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[17] Southern Pacific Comments at 7. AT&T itself acknowledges the use of radio facilities to deliver group facilities to the Government's premises. *See* AT&T Comments at 7, n. ***.

[18] *See* Docket No. 81-351, American Telephone and Telegraph Company, 86 FCC 2d 861 (1981).

[19] *See* AT&T Series 7000 Television Transmission Service, February 13, 1981, Vol. 1 at 2-20-2-21. Briefly, PSV cable pairs or 16 PEVL cable, as it is denominated by AT&T, is shielded, low capacitance (0.052 mFd/mi.) 16 gauge (43.8 ohms/mi.) cable with expanded polyethylene insulation designed for carriage of the 4.5 MHz (nominal bandwidth: 6 MHz) television program signal. Each pair is individually shielded with double sheet-copper shield.

[20] *Id.*

pleadings here. We believe, therefore, that the feasibility of using these existing facilities for other applications should be addressed.

17. Even where such shielded cable pairs are unavailable, however, the engineering literature shows that full carrier system transmission can still be accomplished at a power or energy level which meets inter-channel non-interference standards.[21] Additionally, AT&T might distribute these channels using separate binder groups[22] or low capacity microwave as it now does in the provision of wideband service for the government in Tariff 258. *See* AT&T comments at 7, n. **. And in the event these options are not suitable for meeting customer requirements, reasonable special construction charges could be developed. In addition, we note that "a baseband repeater system (local loop) is available which permits [wideband] transmission of the restored polar line signal over ordinary pairs in telephone cable." *See* J.S. Ronne, "Transmission Facilities for General Purpose Wideband Services on Analog Carrier Systems," IEEE Transactions on Communications Technology, Vol. Com. 14, No. 5, October, 1966 at 654. We further note that in order to provide Dataphone® Digital Service (DDS), AT&T must shield or segregate DDS cable pairs in order to overcome potential problems of interference:

> A consideration in providing DDS service is the coordination between DDS and other services that use pairs within the same cable. Certain amounts of segregation are necessary so that undue crosstalk from DDS, particularly at 56 kb/s, is not accumulated in other services. Segregation is achieved by placing susceptible services in adjacent or alternative cable units (splicing groups in the case of layer cable) . . .

See Bender, *et al.*, Digital Data System: Local Distribution System, The Bell System Technical Journal, Vol. 54, No. 5, May-June 1975, pp. 919, 929. Finally, we would observe that AT&T formerly leased a large number of groups and supergroups to Western Union and had offered to provide such facilities to the IRCs. [23] In short, AT&T has demonstrated the ability to overcome similar technical problems in the local distribution of its other high capacity services including DDS, 230.4 kbps and 1.544 Mbps high speed data channels, audio and video program transmission services and full carrier system services to other carriers. Under these circumstances, we find its pessimism unfounded.

18. *Cost Considerations*. AT&T asserts that to separate group and supergroup channels from mandatory, AT&T-provided terminal

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[21] *See* V. K. Prabhu, "On the Performance of Digital Modulation Systems that Expand Bandwidth," Bell System Technical Journal, Vol. 49, No. 6, July-August 1970, at 1033, 1034.

[22] A binder group is a separate concentric bundle of wire pairs in a cable.

[23] *See, e.g.*, Western Union Comments, Appendix A. RCA Comments at 2, App. D.

equipment would require new construction of cable and interfaces. AT&T considers this a "relatively high cost solution acceptable only for specialized applications."[24] Thus, AT&T claims that special construction would ordinarily be required because "local plant consists generally of wire pairs, which are not suitable for delivering wideband analog signals in the group or supergroup spectra."[25] It also argues that while groups and supergroups are an essential part of the telephone industry's long distance network, they terminate in fewer than 500 of the more than 10,000 wire centers throughout the country.[26] We have already noted above the possibilities open to AT&T to accomplish the local distribution of full carrier system channels. As for wideband services, furthermore, AT&T has given no reason why the mandatory use of AT&T-provided equipment to the exclusion of customer-provided equipment contributes to cost effectiveness. Evidence of AT&T's past pricing practices contradicts its statements here that group and supergroup facilities are costly. For example, Western Union International, Inc. (WUI) points out

> When AT&T offered this type of facility to the IRCs pursuant to the General Lease Agreement, a discount was applied to group/supergroup facilities. For example, the charge for a voice grade circuit between New York and Etam under the contract was $439. The per-circuit charge for a New York-Etam group facility was $203 and $160 for a supergroup facility. These contracts were in force until 1977.

WUI Reply Comments at 7. In any case, AT&T does not explain why the per-circuit rates for groups and supergroups that were cheaper than individual circuit rates prior to 1977 are now more costly. Under these circumstances, we cannot accept AT&T's contention that group and supergroup channels are not practical means for the provision of high capacity services when it was apparently practical and cost-effective for AT&T to have provided these facilities in the past to other carriers. In any event, as will be explained, where AT&T would incur additional costs owing to the need for specially constructed local distribution facilities, such costs would be fully recovered from users.

19. Equally significant, AT&T itself has used and continues to use groups and supergroups to provide high capacity services on a general basis, but it has never suggested that in those instances groups and supergroups were not cost effective for such purposes.

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[24] AT&T Comments at 4.

[25] AT&T Comments at 4, 6. AT&T also incorrectly assumes from the Notice that the Commission's proposed action would have made the full carrier system group and supergroup spectrum available at the customer's premises. As noted above in para. 12, this is not the case. Also, as we discuss in paras. 19 through 20, AT&T itself successfully uses existing local distribution plant to offer useful group and supergroup-based wideband services to the public.

[26] *Id.* at 6.

The circumstances under which AT&T formerly offered TELPAK, for example, are illustrative. TELPAK private line service, a general offering, was configured at the customer's option as a wideband analog facility. Although AT&T states that "TELPAK was never conceived as an analog bandwidth offering",[27] the TELPAK tariff stated that

> This series provides Base Capacity for transmitting various forms of electrical communication up to the limits specified for the various types as set forth in (1) following . . .
>
> (1) Base Capacity.
>
> Base Capacity denotes the potential for communications channels and services which can be realized only with the use of service terminals furnished under (2) following. *Base Capacity, with appropriate Terminating Arrangements, is provided for use as a wide-band channel or for use as wide band channels and/or individual channels of lesser capacity* which in total do not exceed the equivalent voice grade capacity for each type.

See AT&T Tariff FCC No. 260, Section 3.2.5(a),(A)(1), 3rd Revised Page 79, effective April 1, 1968 (emphasis supplied). AT&T also provided Type 5751 "service terminals" or "terminating arrangements" allowing use of the "base capacity" as a wideband channel *i.e.* for the provision of 230.4 kbps service. *Id.* at (A)(2), 7th Revised Page 80.1 at (A)(2)(a).[28] Similarly, Series 8000 is available on a nationwide basis. These practices clearly are inconsistent with AT&T's present claim that the use of group and supergroup facilities for the provision of high capacity channel service is a "relatively high cost solution acceptable only for specialized applications."[29]

20. To sum up, AT&T has not persuaded us that the separation in the tariffs of AT&T-provided terminal equipment from its current Series 8000 offering or from its 230.4 kbps high speed data transmission channel in Tariff No. 258 and the resulting wideband channels will not, at least potentially, result in a cost-effective customer alternative which would permit the use of customer-owned or customer-designated equipment. Additionally, from the point of view of our expressed regulatory policies, it is important that AT&T not be allowed to use its market power to foreclose competition in an

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[27] AT&T Reply Comments at 4, n. ****. AT&T also appears to acknowledge that its 230.4 kbps service formerly available under TELPAK and now available under Tariff 258 remains a general offering. *See* AT&T Comments at 10, n. *.

[28] Under the TELPAK tariff, however, the service terminals required to terminate group or supergroup facilities included data modems.

[29] In its comments in Docket No. 79–246, the private line rate structure proceeding, AT&T proposed to offer what it termed High Speed Data Channels to replace the present Series 8000. According to AT&T's proposal, High Speed Data Channels would be provided using a combination of group (48 kHz) channels and data modems.

unreasonable manner. By tying the availability of certain transmission channels to AT&T provided equipment,[30] it effectively closes other vendors out of a portion of the equipment market and inhibits arbitrage of the underlying transmission channel. *See, e.g., Resale and Shared Use*, 60 FCC 2d 261, *recon.* 62 FCC 2d 588 (1976), *aff'd. sub nom. AT&T v. FCC*, 572 F.2d 17 (2d Cir. 1978), *cert. denied* 439 U.S. 875 (1978).

21. With respect to full carrier system offerings, we recognize that notwithstanding the possibilities for local distribution pointed out above, in many cases existing facilities may not permit direct connection to the carrier system baseband group and supergroup bandwidths. Under such circumstances, we think it appropriate that rates for such local distribution channels be developed on a case-by-case basis, with the application of special construction charges. The development and filing of such rates should pose no particular difficulty inasmuch as this is a common practice.[31]

Market Considerations

22. *Market for Groups and Supergroups*. AT&T next argues that at present there is a relatively small market for the existing 50 and 56 kbps and 230.4 kbps services and that outside manufacturers may have little interest in marketing new data sets. On this basis it questions whether unbundling of AT&T-provided terminal equipment would yield price benefits to customers or promote greater innovation in data sets. AT&T Comments at 11. In other words, AT&T assumes that the market for the underlying groups and supergroups would be correspondingly small and therefore that the cost of separating them from AT&T data sets and modems is not outweighed by other advantages.

23. Significantly, though, AT&T offers no evidence to support these assumptions. Furthermore, the record supports the opposite result. All other comments in the record confirm that a demand exists for the underlying channels, and that the existing 56 kbps and 230.4 kbps offerings which tie AT&T-provided terminal equipment to the underlying groups and supergroups will not suffice.[32] RCA's comments, for example, are illuminating:

RCA's lack of access to group and supergroup bandwidth facilities

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[30] Where customers are interested in wideband services of the type provided under Series 8000, special construction does not, because of its likely high cost, appear to be a practical substitute for the use of groups and supergroups in conjunction with existing local distribution plant.

[31] *See, e.g.*, AT&T Tariff FCC No. 265, Section 4; AT&T Tariff FCC No. 268, Section 4.3.1.

[32] *See* American Telephone and Telegraph Company, Satellite Television Service, 87 FCC 2d 889 (1981), where the Commission found unlawful AT&T tariff provisions bundling space segment and earth stations which seemed to have been filed for no other reason than to constrain space segment demand.

> also contributes to delays in the restoration of high-speed overseas digital circuits (circuits used for data and record transmission at 56 kbps and higher speeds). Because AT&T presently requires that only modems furnished by AT&T at AT&T locations be used to convert the signal from analog to digital, when an overseas circuit fails, requiring service from another overseas facility, a modem must be installed at the alternate facility. This increases the amount of time necessary to effect restoration. If RCA Globcom were permitted to acquire its own group and supergroup bandwidth facilities, we would have the option to provide our own modems and structure our own interoffice network in such a fashion as would minimize delays in restoration as well as the cost of obtaining both primary and restoration capacity. Furthermore, in addition to reducing restoration delay and cost, circuit degradation resulting from back-to-back modems could be minimized or eliminated.

RCA Reply Comments at 9–10. Moreover, the Independent Data Communications Manufacturers Association (IDCMA) disputes AT&T's assertion that independent manufacturers are not interested in offering equipment for use with group or supergroup services. They state that:

> Certain IDCMA member companies have equipment that could be used in this marketplace, and would seriously consider entering this market if AT&T's tariff restrictions were lifted. *See* IDCMA Reply Comments at 7, n. 16. Thus, we cannot agree with AT&T's implication that no demand exists for group and supergroup facilities without the AT&T provided modem or terminal equipment. In any case, mere speculation that demand would be slight is insufficient reason to deny consumers the choice to obtain transmission channels without AT&T-supplied terminal equipment.

24. *Existence of Substitutes for Groups and Supergroups*. AT&T next asserts that the DS–1 1.544 Mbps channels then under development would constitute a better means of meeting the demand for high capacity services.[33] Although we are generally aware of the advantages of high speed digital channels, AT&T has not demonstrated that the 1.544 Mbps (DS–1) channel should be provided in lieu of groups and supergroups and any special construction required to terminate them. It seems self-evident that AT&T already needs to be familiar with the characteristics of the group and supergroup channels to which it attaches modems and other terminal equipment in order to ensure that its bundled service offerings function reliably. As for full carrier system interconnection, it seems that standards

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[33] This filing was made on July 30, 1982 under Transmittal No. 14065. It was modified and refiled under Transmittal No. 14186 on December 3, 1982 and is now scheduled to become effective March 3, 1983.

for such interconnection must have existed in the past when AT&T provided groups and supergroups to other carriers.[34] For these reasons, we may infer that interconnection could be readily implemented.

25. AT&T also claims that expensive shielded cable would be required to deliver group or supergroup frequency spectrum to the customer's premises in almost all cases, while only low cost modifications would have to be made for the provision of 1.544 Mbps service. However, the carrier has not specified what these low cost modifications are or how they differ from modifications which could be made to accommodate group and supergroup requirements. Our own experience teaches that such modifications can be extensive. We note, for example, that wire pairs used in connection with existing 56 kbps and 1.544 Mbps services must be segregated from wire pairs used for other services to avoid an intolerable amount of cross-channel interference.[35] We also note that local wire pairs must, as AT&T states,[36] be modified by removing loading coils and bridge taps and by the addition of repeaters to make them suitable for the carriage of digital signals. In addition, 1.544 Mbps service requires the use of as many as three digital loopbacks in order to allow for remote circuit maintenance.[37] Thus, although we have not been presented with any evidence that it would be less costly to adapt local wire pairs for DS–1 than for the provision of groups and supergroups, AT&T in any case will be permitted to recover any additional costs through special construction charges where existing local distribution plant is not suitable. Thus, the customer will be in the position to decide, based on his own needs, which service is most effective.

26. It is also significant that while AT&T views the 1.544 Mbps DS–1 channels as an adequate substitute for groups and supergroups, this view is not shared by many commenters. WUI, for example, notes that it offers alternate voice/data (AVD) service to the public and that a group could be used for 12 or 16 voice channels, 12 or 16 9.6 kbps data channels or a combination of voice and data channels. It states that in order to obtain the same transmission quality and flexibility as that offered by a group facility, it would have to obtain a 1.544 Mbps channel with bandwidth capacity greatly in excess of an analog group facility, and that this would be a very wasteful use of facilities since the excess capacity would lie idle. *See* WUI Comments at 3. WUI also points out that AT&T's DS–1

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[34] SBS notes that the supergroup interface is "extremely commonplace in the telephone network and commercially available from a number of vendors." SBS Reply Comments at 3.

[35] *See* Bender, *supra* at 929.

[36] *Id.* at 928.

[37] *Id.* at 930.

service would needlessly interpose a digital facility into WUI's end-to-end analog facility plant. Finally, it emphasizes that AT&T itself uses groups, supergroups and mastergroups to transmit communications to the various U.S. Intelsat stations. SBS echoes WUI's comments, and adds that the DS–1 channel offering would not be a complete solution to the needs of other carriers since 1.544 Mpbs T-carrier facilities are short haul in nature. SBS also doubts whether long haul 1.544 Mbps capacity is available.[38] Against this record, we cannot agree with AT&T that the parties' acknowledged need for high capacity transmission could be satisfactorily met by other than group or supergroup channels, or that DS–1 channels are necessarily a preferable alternative. Moreover, if the DS–1 offering is as attractive and economical as AT&T asserts, logic dictates that most customers would elect to use DS–1 instead of group and supergroup channels assuming that all were available. In any case, absent some compelling reason to the contrary, we believe the better course is to have the customer rather than AT&T make that choice.

Conclusions And Implementation

Summary

27. We conclude from the record before us that the availability of group and supergroup services under general tariff schedules will benefit the public. As discussed above, AT&T has failed to meet the burden of justifying the limitations it has placed on the availability and use of group and supergroup channels. It is also clear that there is little, if any, public detriment in having group and supergroup channels available to the public while many private benefits would result from such availability. It further appears that AT&T has failed to justify its refusal to provide groups and supergroups to the

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[38] T-carrier has been generally limited by AT&T to hauls of 50 miles presumably because of economic considerations which principally reflect voice channel cost characteristics (where data transmission is concerned, T 1 and digital carrier systems generally would prove economical for longer distances). Long-haul transmission of 1.544 Mbps signals has generally been accomplished over analog cables, satellites, or microwave based carried systems or on the limited amount of 1ARD or 3ARD digital microwave radio used primarily for Dataphone® Digital Service. *See* Snow, *et al.*, Digital System: System Overview, The Bell System Technical Journal, Vol. 54, N. 5, May-June 1975, pp. 811, 824. The article also states that DS–1 signals may be carried in some cable routes over analog L4 and L5 coaxial cables. *Id.* Since this article was written, the principal change which has taken place is the recent addition of digital fiber optic systems to the long haul transmission plant. Although we recognize the significant potential impact of fiber optic technology in AT&T plant provisioning, for the near term we foresee little change in the manner of handling long-haul digital information. *See* American Telephone and Telegraph Company (Series 9000), Mimeo No. 2364, released February 24, 1982. In particular, we note that AT&T itself has informed the Commission of its plans to offer a 1.544 Mbps service over analog facilities. *See* AT&T Responses to Information Requests, Transmittal No. 14065, August 23, 1982.

public upon reasonable request as Section 201(a) requires. As to the manner in which AT&T should make these channels available, we are able at this juncture to conclude that where the intended use is for full carrier system transmission *i.e.*, where the customers require the full 48 kHz and 240 kHz spectra, suitable facilities can be obtained through special construction provisions of the tariffs. This matter is further discussed below. As to the use of these channels for wideband services such as of the types provided by AT&T under Tariffs 258 and 260, previously discussed, we are unable to determine from the present record how and whether these services can be unbundled from AT&T terminal equipment and filed in the tariffs in a manner which will result in useful public offerings.[39] Since we have concluded, however, that substantial public benefits would accrue if customers were free to designate their own modems or data sets rather than being limited to those supplied exclusively by AT&T, it is important that we make further inquiries into the most effective means of achieving such potential benefits.

28. *Provision of Full Carrier System Group and Supergroup Channels*. As noted, AT&T believes thatif it is required to offer group and supergroup channels, it should be permitted to do so in an individualized fashion with charges quoted on a case-by-case basis.[40] We have already outlined a number of options which appear to be open to AT&T to provide local distribution of full carrier system group and supergroup services from available facilities without the need for special cable construction. We cannot, however, from the record before us, determine the feasibility of using such facilities as video grade cable for these services or the geographical extent to which such facilities are available. We will, therefore, permit AT&T initially to file its tariff provisions for the full carrier system services conditioned upon the need for special construction of local distribution channels. The interexchange portion of the service, however, should be filed under a general rate schedule applicable to all users, whether involving full carrier system or wideband service, in order to minimize opportunities for discriminatory practices.[41] We will, however, require that within six months of the release of this order, AT&T file with us a statement outlining steps which it has taken to

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[39] By unbundling Series 8000 channels, for example, the customer would be provided the same type of local distribution channel currently available on a nationwide basis under the tariff without the need, in the normal case, for special construction. In other words, where AT&T provides bundled wideband services based on group and supergroup channels, it is able to use local distribution plant which exists principally by virtue of standard telephone, or voice-grade plant requirements.

[40] See AT&T Comments at 17.

[41] Experience shows that development of rates on an individualized basis lends itself to the potential for unreasonable price discrimination. *See, e.g.*, American Telephone and Telegraph Company Private Line Rate Structure and Volume Discount Practices, 74 FCC 2d 226 (1979).

review the feasibility of utilizing existing plant of perform the above-referenced local distribution functions in accordance with our discussion here. Should such use of existing plant even on a limited geographic basis prove feasible, we expect that AT&T will at that time submit a proposal for future tariff revisions. In the meantime, customers having a need to obtain full carrier system group and supergroup channels, including common carriers, will be able to obtain the local distribution portion of such channels pursuant to special construction. Special construction charges will be developed on a case-by-case basis and will, in accordance with standard tariff practice, be filed in the tariffs as the occasion requires.

29. As for technical specifications, we think it self-evident that AT&T is in the best position to initially formulate interconnection, interface and protection standards for group and supergroup channels. We expect that these standards will effectively guard against any potential harm to AT&T's network without unreasonably limiting customers' use of service. Moreover, AT&T has agreed to publish such standards in a technical publication, and we will permit it to do so, subject to further Commission oversight if necessary including any need for modification of Part 68 of the Commission Rules. As a separate matter, we expect that reasonable limits on the availability or time interval before start up of service could be imposed with proper justification.

30. *Provision of Group and Supergroup-Based Wideband Services*. The main question which remains concerns the form which a wideband group or supergroup tariff offering would have to assume in order for it to be a practical and useful service to the public. We have already noted that at present AT&T successfully utilizes these channels in providing end-to-end data transmission services which are tied to the use of AT&T-supplied data station equipment. In so doing, however, as we noted in para. 7 *supra*, AT&T is able to overcome the problems associated with variance in electrical characteristics between different wire pairs though the use of back-to-back modems located at customer premises and telephone company central offices. The matters on which we seek additional comment concern how and whether the unbundled transmission components *i.e.*, the local distribution and interexchange channels, can be used by the public for wideband services using either their equipment, AT&T's, or a combination of the two. If wide variation in electrical characteristics or resultant signal degradation in the distribution plant prove to be significant impediments to the usefulness of groups and supergroups in connection with wideband services, a simple unbundling of existing tariff services may not prove adequate. Should this prove the case, there appear to be a number of potential ways to resolve this problem. Establishment of uniform interface

standards, for example, is one way. However, as AT&T intimates in its comments, this might be accomplished only at great expense[42] and might require substantial new plant investment. Another possibility is for AT&T to individually test and grade each local distribution facility in order to ascertain interface criteria on an individual customer basis. Still another would be for AT&T to provide customer compatible devices at central offices.

31. In sum, we conclude that the next appropriate step is to take comment from AT&T on the concerns we have raised above, followed by reply comments by other interested parties. We ask that any comments on the issues we have raised in para. 30 *supra* provide as much technical and engineering information as possible towards resolving the questions of how and whether wideband channels can be unbundled from AT&T terminal equipment to yield practical and useful public offerings.

32. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 201–205, 403 and 404 of the Communications Act, That AT&T shall file tariff revisions in conformity with this order within thirty days of its release, such tariff revisions to be made on ninety days' notice. The technical specifications for the group and supergroup channels may, however, be published and made available to the public at any time before the effective date of the tariff.

33. IT IS FURTHER ORDERED That AT&T shall within six months of the release of this order provide to the Commission a list of any locations where existing local distribution facilities can be used or where it appears feasible to modify them for use, in the provision of full carrier system group and supergroup channels.

34. IT IS FURTHER ORDERED That AT&T shall provide the information in paras. 30–31 by April 1, 1983 and that comments be filed upon this information by May 27, 1983.

INITIAL REGULATORY FLEXIBILITY ANALYSIS

Reason for Action and Objective

35. By this order, the Commission has already required AT&T to make available to the public high capacity analog channels of communication called "groups" and "supergroups." These channels have bandwidths of 48 kHz and 240 kHz, respectively. These channels are useful to large users of communications because of the flexibility they afford. Specifically, a user could use these channels for voice, subvoice, or data communication or a combination thereof.

36. AT&T has agreed to make these channels available, but customers would apparently have to pay for the special construction

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[42] *See* AT&T Comments at 7: " . . . the interface necessary between an AT&T provided group or supergroup channel and the customer would be relatively complex and subject to transmission constraints which would limit the range of applications for the channel."

of the local distribution portion of these channels. Such special construction charges could be very substantial. However, AT&T now successfully utilizes groups and supergroups in the provision of high speed data transmission services without having to impose special construction charges on users of those services.

37. This Further Notice of Proposed Rulemaking seeks to determine whether it is feasible for telephone company customers to obtain group or supergroup channels without having to pay special construction charges.

Legal Basis

38. Section 1 of the Act establishes the Commission for the purpose of regulating communications to make available to the public a rapid and efficient communication service with adequate facilities at reasonable charges.

39. Section 201(a) of the Act requires every carrier subject to the Commission's jurisdiction to provide service upon reasonable request, and Section 201(b) requires that all charges, practices, classifications and regulations be reasonable.

40. The Further Notice would examine whether it is reasonable and efficient for AT&T to provide groups and supergroups only when it also imposes special construction charges.

Description, Potential Impact, and Number of Small Entities Affected

41. The members of the public who are likely to use group and supergroups are large users of communications, which include both non-dominant communications common carriers as well as large end users of communications.

42. If groups and supergroups become available without the necessity for special construction, this could afford large users greater flexibility in their use of communication facilities and, by allowing them to use terminal equipment which most efficiently meets individual needs, to minimize their communications expenses.

43. Because the heavy users of communications who are likely to subscribe to these circuits are likely to be large businesses, it is unlikely that many small businesses will be affected.

Reporting, Recordkeeping and Other Compliance Requirements

None.

Federal Rules which Overlap, Duplicate or Conflict

None.

Significant Alternatives Minimizing Impact on Small Entities and Consistent with the Stated Objective

None.

44. IT IS FURTHER ORDERED, That in reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, provided that such information or a writing indicating the nature and source of such information is placed in the public file, and provided that the fact of the Commission's reliance on such information is noted in the Report and Order.

45. For purposes of this non-restricted informal rulemaking proceeding, members of the public are advised that *ex parte* contacts are permitted from the time of issuance of a notice or proposed rulemaking until the time a draft order proposing a substantive disposition of such proceeding is placed on the Commission's Sunshine Agenda. In general, an *ex parte* presentation is a written or oral communication (other than formal written comments/pleadings and oral arguments) between a person outside the Commission and a Commissioner or a member or the Commission's staff which addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation must serve a copy of that presentation on the Commission's Secretary for inclusion in the public file. Any person who makes an oral *ex parte* presentation addressing matters not fully covered in any written comments previously filed in the proceeding must prepare a written summary of that presentation. On the day of oral presentation, that written summary must be served on the Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each *ex parte* presentation discussed above must also state by docket number the proceeding to which it relates. *See* generally Section 1.1231 of the Commission's Rules, 47 C.F.R. §1.1231.

46. IT IS FURTHER ORDERED, That the Secretary shall cause a copy of this order to be published in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION,
WILLIAM J. TRICARICO, *Secretary.*

APPENDIX A

PUBLIC BENEFITS OF THE AVAILABILITY OF GROUPS AND SUPERGROUPS REFLECTED IN THE RECORD

Comments

Aeronautical Radio, Inc. (ARINC) asserts that the need by both OCCs and private customers for group and supergroup service is clear and notes that it has already expressed its desire for such service. It also asks that the group and supergroup offerings should be made available on the same basis to both carriers and end users.

The American Satellite Company (ASC) expresses a need for group and supergroup facilities. It points out that when its customers share earth stations, it must lease landline facilities from AT&T, oftentimes 56 kbps Dataphone® Digital Service. AT&T however, by tariff forbids the use of DDS at speeds in excess of 56 kbps. ASC states that if it could obtain 48 kHz groups, it could use non-AT&T modems to transmit at speeds well above 56 kbps.

Citicorp states that it has a need for group and supergroup channels and that the availability of these facilities will allow Citicorp greater access to economies of scale and will allow it to reduce the cost of providing financial services to consumers.

The Federal Executive Agencies state that they are members of the National Communications System (NCS) a confederation of the majority of the long-haul users of telecommunications of the Government, including the Departments of State and Defense, NASA, the CIA, and others. They further note that the NCS has been charged with assuring the availability of telecommunications in any possible emergency situation, and that one of the aims of the NCS was to ensure that interstate common carrier telecommunications networks are interconnected and capable of interoperation in any national emergency. The Executive Agencies submit that the interconnection between AT&T and other carriers at the group and supergroup levels would, if accomplished at points outside critical target areas, significantly enhance the national security and emergency preparedness posture of the nation.

From their standpoint as the largest single end user of telecommunications in the U.S. today, the Executive Agencies urge that groups and supergroups be made available on this basis as well. They state that through multiplexing arrangements the 48 kHz and 240 kHz broadband facilities could provide a variety of voice and data channels. Thus, they observe that a general trade modem is available which assertedly can derive 50 kbps from only six voice grade channels but that AT&T tariff restrictions prevent the user from employing this piece of equipment. Moreover, they argue, the benefits flowing from the ability of the other common carriers (OCCs) to obtain group and supergroup facilities to the public would be flowed through to end users.

ITT World Communications, Inc. (ITT) noted that it had listed the public benefits that would flow from its ability to obtain groups and supergroups in a petition it had filed in 1978. It reiterated that the availability of groups and supergroups would permit it to meet the diverse needs of its customers while affording it greater control over its own services. The ability to meet the needs of its customers is severely limited by the restricted bandwidth which AT&T now provides to ITT.

MCI Telecommunications Corporation (MCI) states that the availability of group and supergroup facilities is necessary for the efficient conduct of common carrier operations because it would allow the OCCs to multiplex and condition individual channels without the necessity of AT&T performing unnecessary conditioning and multiplexing. MCI also asserts that AT&T's present refusal to interconnect at the group and supergroup level inhibits the development of innovative uses of the telephone network and is therefore not in the public interest.

RCA Global Communications, Inc. (RCA) points out that its lack of access to group and supergroup facilities has been a longstanding inhibition to the development of new services and greater flexibility in the provision of existing services. It states that the ability to obtain these wideband facilities would result in cost savings even if the rates for groups and supergroups were set at multiples of rates for single channel facilities. Thus, it points out that AT&T's rate for 56 kbps service reflects the cost of group bandwidth plus the cost of an AT&T modem, whereas the same group with a different modem could support three 56 kbps channels at substantially less cost per channel. It also observes that groups and supergroups can be channelized in varying ways, permitting the derivation of both data and voice/data channels of varying speeds, while 50 and 56 kbps channels are limited to use in the data mode and cannot accommodate voice and data. Further, as was observed in the Notice, RCA states that voice grade channels, which are nominally of 4 or 5 kHz bandwidth, are usable for data transmission purposes only at speeds of up to 4.8 kbps or, in some cases, only 2.4 kbps. Thus, according to RCA, users are currently limited to data speeds which can be accomodated on a voice channel or they must incur the significantly higher cost of a 50 or 56 Kbps channel. With access to groups and supergroups, however, RCA asserts that it could derive low and high speed digital channels, along with voice channels required to make efficient use of facilities. For example, it pointed that it had received an order from NASA that required RCA to reconfigure its facilities on almost a daily basis, a need which could not be efficiently met absent wideband facilities.

The Rolm Corporation (Rolm), a manufacturer of private branch exchanges (PBXs) believes that in the near future, medium to large users of telecommunications services will become much more heavily involved in arranging for or otherwise providing their own telecommunications facilities. Rolm states that as end users move in this direction, they will need the flexibility available from wideband facilities.

The Southern Pacific Communications Company (Southern Pacific) reiterated its earlier position that it had a need to obtain wideband analog facilities. It states that its need for such facilities is demonstrated by its use of leased wideband facilities from other carriers. However, it states that it can now lease only individual voice grade circuits from the Bell System Operating Companies (BSOCs) for local distribution to its customers but that it would be more economical and useful to purchase wideband channels, multiplexing and channelizing them on an individualized basis.

Satellite Business Systems (SBS) emphasized its earlier position that the OCCs should have access to wideband facilities, and states that such facilities could be useful to it in linking customer premises located at a distance from an SBS earth station for the purpose of high speed data transmission. Absent the availability of such facilities, the types of applications possible will, it asserts, be artificially restricted to low speed services.

Western Union International, Inc. (WUI), emphasized its stated longstanding need for groups and supergroups and asserted that greater operational flexibility would result from the use of these facilities. In particular, it pointed out that it would be able to derive channels of varying size from the group and supergroup bandwidths suited to the specific needs of particular customers; thus, it states, a customer could use the group facility for voice transmission during the day and for data transmission at other times.

WUI also pointed out that it had a request from a customer for 48 kHz service between the U.S. and Britain which it was unable to meet because of AT&T's refusal to provide the needed channel.

The Western Union Telegraph Company (Western Union) states that the availability of wideband analog facilities such as groups and supergroups would allow it the greastest flexibility in the development of innovative and/or cost-effective value added offerings to the consuming public. With wideband channels, it states that it can provide service better, cheaper, and/or differently. It says that the availability of innovative modems, multiplexers, data in voice units and the like produced by the electronics industry can be connected to the wideband channel to provide the public with an increasing variety of technological alternatives rather than those which AT&T elects to provide.

It also noted that it was unable to compete fully for the provision of special wideband or high speed data transmission services to customers such as NASA absent the availability of wideband channels. It notes that in connection with the Autodin II network for the Department of Defense, it has plans to utilize a 168 kbps modem developed by a non-Western Union vendor to derive three 56 kbps channels from a single 48 kHz group. Absent availability of such groups in areas where its own facilities are unavailable, it states that it will have to lease three 56 kbps channels from AT&T, each using 48 kHz of spectrum. It asserts that there is a competitive disadvantage as well as diseconomies in having to use three 48 kHz channels rather than one to derive the three 56 kbps channels.

Western Union also asserts that if supergroups were available, it could provide a 50 kbps channel from New York to Miami by placing one modem on a 48 kHz group in New York, leasing a 48 kHz group from AT&T between Atlanta and Miami, and placing another modem at the end of the channel in Miami. Since groups are not available from AT&T, Western Union asserts that it is forced to place a second modem at the end of its circuit in Atlanta to interconnect with AT&T's 50 kbps channel there. Thus, it asserts, four modems would be necessary to provide the service (two Western Union modems and two AT&T modems). It states that it would therefore have to bear the cost of four modems while AT&T, in providing the exact same service on an end-to-end basis, would only have to use two modems, giving AT&T a competitive advantage.

Western Union also asserts that without access to groups and supergroups, it does not have the alternative of using half a circuit group (24 kHz) in providing 19.2 kbps channels or 8 kHz audio program channels to the public.

Finally, Western Union notes that with the availability of wideband facilities, individual voice-grade circuits terminating at a common destination point can be collected into a group and routed from end location to end location without intermediate voice-grade multiplexing, resulting in substantial savings in intermediate multiplexing equipment. Such routing also allows for the provision of higher quality service since each point at which multiplexing or submultiplexing is performed adds to the amount of noise in the end-to-end circuit.

Reply Comments

The Independent Data Communications Manufacturers Association (IDCMA) asserts its support of the unbundling of terminal equipment from groups and supergroups. It states that independent manufacturers presently offer equipment which has greater capabilities than the equipment bundled with AT&T's broadband offerings. IDCMA states that the unbundling of terminal equipment from AT&T's broadband offerings would serve the Commission's pro-competition policy in the terminal equipment area by affording the public a wider choice of terminal equipment.

RCA emphasizes that its inability to access group and supergroup bandwidths also contributes to delays in the restoration of high speed (56 kbps and above) overseas digital circuits. It asserts that because AT&T presently requires that only modems furnished by AT&T at AT&T locations be used to convert the signal from analog to digital, when an overseas circuit fails, requiring service from another overseas facility, a modem must be installed at the alternate facility. According to RCA, this increases the amount of time necessary to effect restoration. Moreover, it states, circuit degradation resulting from back-to-back modems could be minimized or eliminated.

WUI points out that if it could obtain access to group and supergroup facilities, it could combine individual circuits for transmission to the appropriate cable or satellite. Since all international transmission media are analog in nature, it asserts that the interposition of a digital channel into WUI's end-to-end service to its customers is a needless exercise. Such inteposition introduces needless costs, such as those necessitated by conversion from analog to digital. These costs, according to WUI, are ultimately imposed on the public. WUI also notes that the ability to obtain supergroups would enable it to offer end-to-end transmission of circuit groups without the cost and complexity of intermediate multiplexing.

Amateur Operator
Amateur Radio Service
License Revocation

Review Board declined to revoke Amateur license or suspend operator license for use of indecent language. Commission has defined and proscribed indecent matter only in certain broadcast contexts and the Board is not empowered to extend this policy to non-broadcast services.
–*David Hildebrand*
PR Docket No. 81-302

FCC 83R–6

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of DAVID HILDEBRAND 3463 N. Knoll Drive Hollywood, California 90068 Licensee of Station N6BHU in the Amateur Radio Service	PR Docket No. 81–302
Suspension of License of DAVID HILDEBRAND 3463 N. Knoll Drive Hollywood, California 90068 Amateur Technician Class Operator License	PR Docket No. 81–303

Appearances

David Hildebrand, *pro se*; and *Thomas D. Fitz-Gibbon* and *Carol Fox Foelak*, on behalf of the Chief, Private Radio Bureau, Federal Communications Commission.

DECISION

(Adopted: January 20, 1983; Released: January 26, 1983) Board Member Blumenthal for the Review Board: Board Chairman Marino issuing a separate statement.

1. In an Initial Decision (FCC 82D–68, released October 4, 1982), the ALJ (Joseph P. Gonzalez) revoked the Amateur Radio Service

license of the subject upon a finding of a violation of 47 C.F.R. §97.119[1] which prohibits the transmission of obscene, indecent, or profane matter. Hildebrand, *pro se*, has filed exceptions. The Private Radio Bureau urges affirmance.

2. The material facts are not in dispute. On January 24, 1981, Hildebrand engaged in an exchange over amateur radio frequencies in which he used gutter parlance. *See I.D.*, para. 7. Nobody here contends that the material uttered was obscene within the legal definition; there is no appeal to prurient interests.[2]

3. The Initial Decision, citing *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978) and *Rowan* v. *Post Office*, 397 U.S. 728 (1970), found a general governmental right to protect citizens from the "unwelcomed views and ideas" into their homes. *I.D.*, para. 15. Finding that there are 66 Amateur radio operators under 17 years of age licensed in the Los Angeles area (*id.*) and analogizing the reasoning in *Pacifica*, the ALJ revoked because of Hildebrand's alleged indecent language.

4. We must disagree with that decision. The Commission has precisely defined and proscribed indecent matter in certain broadcast contexts, *Pacifica Foundation*, 56 FCC 2d 94 (1975), and specifically articulated its concerns in the unique area of broadcasting where the signals are available indiscriminately even to children of very tender years.[3] The Supreme Court narrowly affirmed the Commission's *Pacifica* ruling on that basis.[4] Without such specific standards, proscriptions on speech may well be stricken for vagueness. *Miller* v. *California*, *supra* note 2, 413 U.S. at 24, 27; *cf.*

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[1] This section of the Commission's rules tracks the Criminal Code provision set forth in 18 U.S.C. §1464 (1948).

[2] *See generally, Miller* v. *California*, 413 U.S. 15 (1973). Were the transcripts proffered at hearing shown to be obscene within the established legal definition, a different result might here obtain.

[3] *See* 56 FCC 2d at 98:

> [T]he concept of 'indecent' is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards *for the broadcast medium*, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience. 56 F.C.C.2d, at 98. [Emphasis added.]

Each medium of expression has its own First Amendment problems. *Joseph Burstyn*, Inc. v. *Wilson*, 343 U.S. 495 (1952).

[4] Emphasizing the unique and pervasive nature of broadcasting, the *Pacifica* Court stated:

> "It is appropriate, in conclusion, to emphasize the narrowness of our holding. This case does not involve a two-way radio conversation between a cab driver and a dispatcher . . . ." [438 U.S. at 750.]

Amateur communications are not a form of broadcasting and are not transmitted to the public-at-large, *compare* 47 C.F.R. §§97.3(b), 97.89, 97.91, *with* 47 U.S.C. §153(o).

Illinois Citizens Committee For Broadcasting v. *FCC*, 515 F.2d 397, 404–05 (D.C. Cir. 1974).

5. Although we recognize that 18 U.S.C. §1464 remains on the statute books and do not, of course, question its basic validity,[5] we must also not disregard the substantial judicial refinement of governmental parameters in this sensitive area of the law. *See, e.g., Cohen* v. *California*, 403 U.S. 15 (1971). Nor are we or the ALJ empowered to extend the Commission's finely-wrought policy regarding the channeling of material in the broadcast media and set forth in its declaratory ruling in *Pacifica Foundation, supra*, to non-broadcast services. *Cf. Horne Industries, Inc.*, FCC 82R–68, released November 26, 1982 (Rev. Bd.) (Board not empowered to make policy). While the Private Radio Bureau cites apparently unpublished material for the proposition that the agency has taken action under §97.119 of the Rules, it is not clear that any of those proceedings involved that rule solely or defined indecency in the non-broadcast context. No other rule violations are here pressed against Hildebrand.[6]

6. ACCORDINGLY, IT IS ORDERED, That the motion to strike, or in the alternative, to accept responsive pleading, filed November 22, 1982, by the Chief, Private Radio Bureau, IS GRANTED to the extent that its reply brief is accepted and IS DENIED in all other respects; and

7. IT IS FURTHER ORDERED, That the Order to Show Cause why David H. Hildebrand's license for Amateur radio station N6BHU should not be revoked and suspending his Amateur Technician Class operator license IS DISMISSED and the proceeding IS TERMINATED.

NORMAN B. BLUMENTHAL, *Member, Review Board,*
FEDERAL COMMUNICATIONS COMMISSION.

SEPARATE STATEMENT OF BOARD CHAIRMAN MARINO

While joining fully in the Board's unanimous decision, this case and the still smoldering controversy in *Faith Center, Inc.*, FCC 83R–3, released January 17, 1983, indicate that there is a continuing need for the utilization of procedural means which will permit a radio licensee to obtain Commission and Court adjudication of his constitutional rights without putting his license in jeopardy. See *e.g., Pacifica Foundation*, 56 FCC 2d 94, para. 15 (1975).

A decade ago then Chairman Dean Burch warned that often the evil sought to be cured by government action "requires the delicate hands of a surgeon. The type of surgery that you [the licensees] can best prescribe—and perform—within your ranks. I fear as you do the hands of the government that will be called upon as a last resort—the stubby, gnarled bureaucratic hands that belong on a 3rd string catcher in the minor leagues, not on a public interest physician." J. A. p. 12, *Illinois Citizen Committee for Broadcast* v. *FCC*, 515 F.2d 397 (D.C. Cir. 1974).

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[5] 18 U.S.C. §1464 was originally embodied as Section 29 of the Radio Act of 1927, 44 Stat. 1172–1173.

[6] In light of our decision, we need not consider Hildebrand's other technical and procedural exceptions to the Initial Decision.

Past and the recent renewal and revocation cases confirm the wisdom of this Commission's traditional reliance on licensee self restraint, and the Commission's reluctance to take any action which may even remotely infringe upon constitutional rights without first permitting the licensee to obtain judicial review. See *e.g.*, *Red Lion Broadcasting Co.*, v. *FCC*, 395 U.S. 367 (1969); *Yale Broadcasting* v. *FCC*, 478 F.2d 594 (D.C. Cir. 1973); *Illinois Citizen Committee, supra*; *Pacifica Foundation*, 56 FCC 2d 94, paras. 15 and 16 (1975), *affirmed* 438 U.S. 726 (1978).

In the *Hildebrand* case, FCC 83R–6, the Board's decision deftly corrects a well meaning but badly flawed effort to sanction an individual licensee who maintained he was exercising his freedom of expression. PRB Ex. 2, p. 12. As previously noted Faith Center's constitutional objections should be sharply focused and directed to the Commission which has jurisdiction over the issue. *Faith Center, Inc., supra*, FCC 83R–3, para. 17.

FCC 82D-68

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
Revocation of License of

DAVID HILDEBRAND
3463 N. Knoll Drive
Hollywood, California 90068

Licensee of Station N6BHU in
the Amateur Radio Service

PR Docket No. 81-302

Suspension of License of

DAVID HILDEBRAND
3463 N. Knoll Drive
Hollywood, California 90068

Amateur Technician Class
Operator License

PR Docket No. 81-303

Appearances

William N. Byhower on behalf of David Hildebrand; and *W. Riley Hollingsworth* on behalf of Chief, Private Radio Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH P. GONZALEZ

(Issued: September 24, 1982; Released: October 4, 1982)

Preliminary Statement

1. David Hildebrand is the licensee of station N6BHU in the Amateur Radio Service and holds an Amateur Technician Class operator license, both of which expire on March 6, 1984.

2. On March 20, 1981, the Chief, Private Radio Bureau, acting pursuant to delegated authority, released an Order directing David Hildebrand to show cause why his radio station license should not be revoked. The Order also suspended his Technician Class radio operator license.[1]

3. The Order specified the following issues for determination:

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[1] The suspension was held in abeyance after Mr. Hildebrand requested a hearing pursuant to Section 1.85 of the Commission's Rules.

(a) To determine whether there were transmissions on January 24, 1981, in wilful violation of Section 97.115[2] and/or 97.119[3] of the Commission's Rules.

(b) To determine whether Hildebrand has the requisite qualifications to be a Commission licensee in the Amateur radio service.

(c) To determine whether, in light of the evidence adduced under issues (a) and (b), Hildebrand's license for Amateur station N6BHU should be revoked.

(d) To determine whether the suspension order should be affirmed, modified or dismissed.

4. The prehearing conference was held in Los Angeles, California on September 17, 1981, and the hearing on September 18, 1981, and the record was closed on September 18, 1981. The Bureau filed Proposed Findings of Fact and Conclusions of Law on October 27, 1981 and David Hildebrand filed his Proposed Findings of Fact on February 1, 1982. On February 12, 1982, the Bureau filed a reply to Hildebrand's proposed findings.

Findings of Fact

5. As noted above, David Hildebrand holds a Technician Class Amateur license and a license for Amateur radio station N6BHU. He currently resides in Hollywood, California.

6. On January 24, 1981, at approximately 7:00 P.M., Anderson Bennett and Dan Bosque, engineers with the Federal Communications Commission's Long Beach, California District Office, monitored Mr. Hildebrand transmitting on frequency 146.010 MHz, to the so-called Hollywood repeater station, which, in turn, retransmitted the signal on frequency 146.610 MHz (Tr. 17, 29, 30). The area of coverage of the repeater station includes approximately nine million people (Tr. 17). Mr. Bennett, by the use of a close range direction finding device and a tape recording of Hildebrand's transmissions made during the direction finding effort, arrived at Hildebrand's home at 7:43 P.M. (Tr. 16–18). The Commission's engineers, with Hildebrand's permission, conducted an inspection of the radio station, and spoke with the licensee, David Hildebrand (Tr. 19). Upon leaving Mr. Hildebrand's home, the engineers again monitored and taped Hildebrand's transmissions. A copy of these transmissions, which are of record as Bureau Exhibits 2 and 3, were shown to Mr. Hildebrand at the hearing, and he acknowledged that to the best of his knowledge they came from his station (Tr. 41).

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[2] §97.115 Music prohibited. The transmission of music by an amateur station is forbidden.

[3] §97.119 Obscenity, indecency, profanity. No licensed radio operator or other person shall transmit communications containing obscene, indecent, or profane words, language, or meaning.

7. Hildebrand admits that on January 24, 1981 he participated in the following communications (Tr. 41):[4]

GMT	January 24, 1981	
OS #2	I PROGRAMMED MYSELF A SUPER LIGHT SEMESTER THIS TIME. I'M TAKING UP ELECTRONICS TWENTY-A AND TWENTY-B AND THAT'S IT. AND I'M GONNA BE GOING A COUPLE NIGHTS A WEEK OVER TO THE BLUE RIDGE PICKING PARLOR, CAN YOU DIG IT?	
N6BHU	HOW COME YOU'RE TAKING SUCH FUNDAMENTAL CLASSES THERE JERRY? HEY YOU GOT GET THAT TRUCK RUNNING SO YOU CAN RUN AROUND WITH US AND GO PARTY AND STUFF. SAY YOU GOTTA COME WORK, WORK WITH US AT THE MAGIC BOX, THAT'S A DYNAMITE PLACE, MAN, THAT PLACE IS CRAWLING FULL OF HAMS AND THEY'RE ALL SCREW OFFS LIKE WA6VHS, HE'S ANOTHER ONE OF THE SCREW OFFS IN OUR BUNCH. THAT GUY'S CRAZY MAN.	7:18 PM
OS #2	NO SHIT, YOU GOT A B, H, F, WORKING THERE FOR CHRIST SAKES, HEY I HEAR THAT GUY ON TWO TWENTY ALL THE TIME.	
N6BHU	NO V, H, S, UH, VERY, HOT, UH, VERY, HOT, UH, SOMETHING OR OTHER I FORGOT WHAT HIS CALL - PHONETICS WERE, BUT ANYWAY, UH, SHEEIT.	
OS #2	YEAH ROGEE, YEAH I CAN DIG IT YEAH I CAN DIG IT HEY WHAT'S YOUR MODE HERE, YOU WORKING MOBILE OR BASE OR WHAT?	
N6BHU	OH I'M WORKING UH, IT'S BASED ON A BASE STATION	

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[4] The material set forth below represents just a portion of the recorded transmissions. In the interests of brevity, the entire transcription was not included in the body of the Initial Decision.

OS #2 O, K, WE GOT YOU COVERED THERE, 7:19 PM
YEAH, I'M JUST WONDERING UH WHAT
KIND OF AN E, T, A, WE COULD PEG ON
YOUR HERE?

N6BHU FAR OUT, HEY JERRY, WHAT DO YOU
CALL AN EIGHTEEN YEAR OLD, UH AN
EIGHTEEN YEAR OLD GIRL FROM THE
SOUTH?

OS #2 UH, WELL IF SHE'S ON THE PILL I'D
CALL HER A SAFE CRACKER.

N6BHU YEAH, RIGHT, I LIKE THOSE SOUTHERN
CHICKS, MAN THEY GIVE GOOD HEAD.

OS #2 AH, GOOD HEAD, GOOD PUSSY, GOOD
ASS, YOU NAME IT, AH LOVE IT, LOVE IT,
LOVE IT, LET ME TELL YOU THERE AIN'T
A ORIFICE ON THEIR BODY THAT I DON'T
LOVE.

N6BHU YEAH, WELL I'LL TELL YOU, THOSE
SOUTHERN CHICKS MAN THEY CAN
FUCK LIKE RABBITS MAN WHEN THEY
MOVE THEIR ASS, YOU CAN FEEL IT MAN
JUST BOUNCING ALL OVER THE PLACE,
BOUNCING LIKE A FOUR WHEEL DRIVE
TRUCK, GOING, GOING ACROSS A DESERT.

OS #2 WHERE DO YOU THINK THEY GET IT
FROM BOUNCING THEIR ASS AROUND IN
A FOUR WHEEL DRIVE TRUCK UP AND
DOWN THEM HILLS.

N6BHU YEAH, NO SHIT SHERLOCK, YEAH, NO 7:20 PM
SURE SHIT LOCK.

OS #2 WELL MAYBE JUST A LITTLE BIT.

NYBHU YEAH, WOW, UH, ANY WAY MAN, THEY
FAR OUT W(UNINTELLIGIBLE) N,6,B,H,U,
MOBILE, UH MOBILE I BEEN WORKING SO
MUCH MOBILE I SIGN MOBILE EVEN
WHEN I'M IN THE BASE. CHRIST, I CAN
JUST SEE MYSELF SITTING ON THE
DAMN TOILET WITH A HAND-TALKIE,
SIGNING N,6,B,H,U, MOBILE, I COULD SIGN
N,6,B,H,U, MARITIME MOBILE THAT
WOULD APPLY.

OS #2	AH SHIT I DO THAT ALL THE TIME, ANY TIME I'M SITTING ON THE JOHN, IT'S MARITIME MOBILE.	
OS	(BELCHING SOUND)	
OS	(SOUND EFFECT)	
OS	FLUNGE	
N6BHU	FLUNGE, F,L,U,N,G,E, FLUNGE FAT LADIES UNDERWEAR NEVER GETS EATEN, THAT'S WHAT FLUNGE MEANS. SO ANYBODY OUT THERE WHO WONDERS WHAT FLUNGE MEANS, THAT'S WHAT IT MEANS, TAKE THE FLUNGE PLUNGE.	
OS #2	EAT A FAT BROAD	
N6BHU & OS #2	(SOUND EFFECTS, REPEATED)	7:21 PM
N6BHU	NEGROIDS COMMUNICATING	
OS #2	(SOUND EFFECT)	
N6BHU	(SOUND EFFECT)	
OS #2	FLUNGE	
N6BHU	FLUNGE	
OS #2	Q, R, X, I GOT COMPANY	
N6BHU	(SOUND EFFECTS) (PAUSE) WHERE ARE - A - YOU CARROWS	
N6BHU	WHAT'S HAPPENED TO YOU.	
OS #2	HEY I GOT COMPANY MAN.	
N6BHU	AH YES, I'M NOT A COMPANY MAN (PAUSE)	
N6BHU	YOU GOT POON - TANG OVER THERE? (PAUSE)	
N6BHU	YES HE DOES HE HASN'T REPLIED YET.	

N6BHU	UH, OH, GOT COMPANY, HE HASN'T COME BACK ON RADIO YET, I HOPE IT AIN'T THE POLICE	7:22 PM
OS #2	WHAT ARE YOU DAVE, YOU DUAL FREQ-ING OR WHAT?	
N6BHU	HUH?	
OS #2	YOU DUAL FREQ-ING OR IS THERE ANOTHER FREAK OUT THERE? (PAUSE)	
N6BHU	DUAL FREQ-ING, WHAT DO YOU MEAN, DUAL FREQ-ING	
OS #2	OH IT'S NOT THE POLICE, RIGHT THAT'S THE COMPANY, IT AIN'T THE PIGS MAN, SCARED THE SHIT OUT OF ME FOR A MINUTE THOUGH (LAUGHTER) NAW MAN SOMEBODY'S GOING (SOUND EFFECT) OVER ON FOUR EIGHT.	
OS	(OTHER STATION UNINTELLIGIBLE)	
N6BHU	WOW, IT THAT'S H, D, B, OH WHAT AN ASSHOLE	
OS #2	WELL THERE GOES THE CHANNEL (OTHER STATION BARELY AUDIBLE, UNINTELLIGIBLE)	
N6BHU	OH, IT'S THAT H, D, B, I HATE THAT FUCKHEAD	
OS #2	HEY, WATCH YOUR FUCKING LANGUAGE (OTHER STATION BARELY AUDIBLE, UNINTELLIGIBLE)	
N6BHU	WATCH YOUR FUCKING LANGUAGE ASSHOLE (OTHER STATION BARELY AUDIBLE, UNINTELLIGIBLE)	
N6BHU	WHY DON'T YOU WIPE YOUR ASSHOLE OFF SO WE CAN HEAR YOU (OTHER STATION BARELY AUDIBLE, UNINTELLIGIBLE)	
N6BHU	GO FLUSH YOURSELF DOWN THE HO - TOILET YOU ASSHOLE (PAUSE)	

8. Although Hildebrand admits engaging in the above set forth

communications, he argues that the Commission has not shown that the words used therein are patently offensive to listeners in the Los Angeles, California area or that the language used by him would appeal to the prurient interests of a listener. He considers the language use in the above set forth communications as standard for the Los Angeles community, and states that the same or similar language has been employed for many years in the Hollywood community without objection from the FCC; and that the testimony at the hearing of the Commission's Engineer-In-Charge at the Long Beach, California District Office, Lawrence D. Guy, supports his contention that community standards determine whether certain words are acceptable and therefore not obscene.

9. Hildebrand contends that the Commission has been lax in enforcing its obscenity regulations, even though by its own admission, it has received numerous obscenity complaints (Tr. 32); and that by filing few, if any, notices of violation, in recent years, it has misled the Amateur radio community into believing that the Commission condoned the use of language of the type employed by him in his transmissions. In support of this claim, Mr. Hildebrand refers to the testimonies of Messrs. Bennett and Guy, which, he states, reveal that only one complaint for obscenity has been issued in the past two years (Tr. 27), and that the last obscenity complaint was issued about a year ago (Tr. 79).

10. Furthermore, Hildebrand states that Lawrence Guy, during the course of a lecture given to Amateur radio operators in Anaheim, California in September 1979, gave the impression that the Commission would not enforce Rule 97.119 because of the difficulty in identifying which words are unacceptable. However, he adds that once he was notified that some of the words employed in his transmissions were objectionable, he made a good faith effort to comply with his understanding of the Commission's Rules.

11. Mr. Hildebrand denies that the communications at issue were broadcasts as that term is used in Rule 97.113 of the Commission's Rules, and argues, therefore, that the Commission's obscenity standards do not apply. He compares these transcriptions to a two-way radio conversation, noting as similarities between the two, the following: (a) radio frequency (VHF spectrum); (b) person-to-person conversation with remarks and replies; (c) remarks and replies being in direct and immediate response to the remarks of the other party; (d) common interest; (e) use of specialized equipment; and (f) (usually) a personal acquaintance; whereas, according to Mr. Hildebrand, a broadcast is a high-powered transmission, a one-way broadcast-on-frequency which is commonly received in homes and automobiles, and provides programming which is purposefully planned and scheduled, often pre-recorded, with an audience many thousands of times greater than that of a two-meter amateur transmission.

12. Furthermore, Mr. Hildebrand claims that the number of persons under 17 years of age who might have heard his transmissions is so small as to be of no legal significance. He estimates that less than three such amateurs could have heard his transmissions.

Ultimate Findings and Conclusions

13. Remaining at issue here is whether David Hildebrand on January 24, 1981 willfully violated Section 97.119 of the Commission's Rules.[5] Section 97.119, 47 C.F.R. 97.119, provides that no licensed operator or other person shall transmit communications containing obscene, indecent, or profane words, language, or meaning. For the reasons set forth below, the Presiding Judge concludes that Mr. Hildebrand knowingly violated Rule 97.119, and that revocation of his radio station license and suspension for term of Hildebrand's Technician Class radio operator license are warranted.

14. Mr. Hildebrand does not dispute the Bureau's claim that he engaged in the communications set forth above. The vulgarities, and the sexually explicit terms and references are, in the opinion of the Presiding Judge, indecent within the meaning of *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978). The U.S. Supreme Court, at page 738, *Pacifica*, *supra*, specifically found that Section 326 of the Communications Act, 47 U.S.C. 326, which prohibits the Commission from censoring or interfering with the rights of free speech by means of radio communications, does not limit the Commission's authority to impose sanctions on licensees who engage in obscene, indecent or profane broadcasting. Section 97.119 of the Commission's Rules represents the Commission's implementation of that authority. The Presiding Judge finds that Hildebrand's communications (Bureau Exhibits 2 and 3) constitute obscene, indecent or profane broadcasting, and represent a violation of that rule, and in view thereof, revocation of his radio station license and suspension for term of his Technician Class Amateur license are warranted.

15. Radio transmissions have unique qualities which distinguish them from other forms of communication and expression. Because of their very nature, they are uniquely accessible to homes over a large area and to audiences of every age. The Commission's records, for example, show that an amateur radio license was granted to a five year old (Bureau Exhibits 5 and 7), and that in the Los Angeles area there are 66 Amateur radio operators who are 17 years old or younger (Bureau Exhibits 5 and 6). Hildebrand's attempt to characterize the subject communications as private conversations, therefore, clearly misses the mark, in view of the large number of persons who might inadvertently be exposed to the patently offensive

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[5] As noted below, the Bureau failed to proffer any evidence or argument with respect to Bureau's charge that Mr. Hildebrand violated Rule 97.115. Accordingly, that issue will be resolved in Hildebrand's favor.

language contained in these transmissions. The Supreme Court of the United States has also recognized the right of a government to prohibit the intrusion into the home of unwelcomed views and ideas. See *Rowan* v. *Post Office Dept.*, 397 U.S. 728 (1970) and *Cohen* v. *California*, 403 U.S. 15 (1971). Rule 97.119 is the means by which the Commission protects the general Amateur radio public from communications which because of their obscene, indecent or profane nature, language or meaning, would not be welcomed.

16. Finally, the Presiding Judge is of the opinion that Hildebrand's argument that he was misled by the Commission into believing that these words were acceptable as representing the community's standards, is without merit. The words, the tenor and general subject matter of the communications are so patently offensive as to belie Hildebrand's claim that they reflect the community standards of the Los Angeles area. His claim that he was misled is further suspect in light of the recorded communications themselves. Mr. Hildebrand acknowledges therein that he has received complaints from other listeners objecting to his language and subject matter;[6] and he also indicates that he is aware that other operators have been "busted" for using obscene language.[7] Finally, Hildebrand's claim of good character and service to his community is contradicted by the patently offensive language and conversations set forth above which he transmitted to the very community which he contends he has served with distinction.

17. On the basis of the undisputed facts of this case, the ultimate conclusion is reached that David Hildebrand does not have the necessary qualifications to remain a Commission licensee, and his Amateur radio station license will be revoked and his Amateur Technician Class radio operator license will be suspended for the remainder of its term.

Concluding Remarks

18. On July 15, 1982, David Hildebrand filed a motion to dismiss which is opposed by the Bureau. Movant has failed to show good cause for seeking the relief requested in his motion to dismiss, and his request will be denied.

Rulings

19. Accordingly, IT IS ORDERED that the Motion for Dismissal filed by David Hildebrand on July 15, 1982 IS DENIED for failure to show good cause.

20. IT IS FURTHER ORDERED that issue 1(a) to the extent that it includes the charge that David Hildebrand violated Section 97.115

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[6] See communications recorded at 7:38 P.M. (Bureau Exhibit 2, p. 11).

[7] See communication recorded at 8:26 P.M. (Bureau Exhibit 3, p. 8).

of the Commission's Rules IS RESOLVED in David Hildebrand's favor.

21. AND IT IS FURTHER ORDERED that unless an appeal from this Initial Decision is taken by a party, or the Commission reviews this Initial Decision on its own motion in accordance with the provisions of Section 1.276 of the Commission's Rules, David Hildebrand's Amateur radio station license N6BHU IS REVOKED and the suspension of his Amateur Technician Class radio operator license for the balance of its term IS AFFIRMED.[8]

JOSEPH P. GONZALEZ, *Administrative Law Judge*,
FEDERAL COMMUNICATIONS COMMISSION.

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[8] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Failure to Prosecute

Review Board denied appeal from ALJ's ruling dismissing application where applicant declined to participate in proper discovery procedures. Board also declined to disqualify itself.
–*Faith Center, Inc.*
BC Docket No. 82–212

FCC 83R-3

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
FAITH CENTER, INC. FOR RENEWAL OF LICENSE FOR STATION KHOF(FM) LOS ANGELES, CALIFORNIA	BC Docket No. 82–212 File No. BRH–826
INSPIRATION MEDIA OF SOUTHERN CALIFORNIA, INC. Los Angeles, California	BC Docket No. 82–213 File No. BPH–10774
CORONADO BROADCASTING OF SOUTHERN CALIFORNIA, INC. Los Angeles, California	BC Docket No. 82–214 File No. BPH–801103AM
For Construction Permits	

MEMORANDUM OPINION AND ORDER

(Adopted: January 10, 1983; Released: January 18, 1983.)

BY THE REVIEW BOARD:

1. Faith Center on November 4, 1982, filed an appeal from an order by Administrative Law Judge Kuhlmann granting a motion to dismiss the renewal application of its FM radio station in Los Angeles. FCC 82M–2746, released September 13, 1982. On November 12, Faith filed a motion to disqualify the Review Board, which was later supplemented. This motion will be denied. See para. 10 below. In accordance with past practice the Board has carefully reviewed the record to insure that the presiding officer acted reasonably and was guided by Commission precedent in striking the balance between the need to protect the integrity of the hearing process and individual rights while insuring that scarce broadcast facilities are licensed to the best qualified applicants. *See Pan American Broad-*

casting Co., Inc., 89 FCC 2d 167, 171 (Rev. Bd. 1982); *Sco-Kim, Inc.*, FCC 2d 960, 963 (Rev. Bd. 1982), *rev. denied* FCC 82–463, released October 28, 1982. A unanimous Review Board has decided to affirm the dismissal of the renewal application for the reasons discussed below, paras. 13–17.

Background

2. On April 22, 1982, Faith Center's application for renewal of its FM radio station in Los Angeles, California was consolidated for hearing with the competing applications of Inspiration Media and Coronado Broadcasting by Commission Memorandum Opinion and Order, FCC 82–186.

3. In its order the Commission noted that in 1978 Faith Center's license for San Bernardino television station KHOF-TV had been set for hearing "to determine whether Faith Center, Inc. had conducted fraudulent over-the-air fund raising and refused to cooperate with Commission investigators." FCC 82–186, para. 21. These issues were never resolved because the San Bernardino television renewal application was dismissed with prejudice for failure to prosecute by failing to respond to valid discovery orders.[1]

4. In the hearing order, the Commission also noted that in 1980 the same issues were designated against another of Faith's television stations in Hartford, Connecticut, but again were not resolved because the Commission subsequently approved a distress sale proposed by Faith. *Id.* Accordingly, in this proceeding those issues were specified against its Los Angeles FM radio station:

> To determine with respect to Faith Center, Inc.:
>
> a. All the facts and circumstances surrounding Faith Center, Inc.'s failure to permit Commission access to certain licensee books, records and employees in connection with BC Docket No. 78–326. [Note 1 below]
>
> b. Whether Faith Center, Inc., failed to submit information requested by the Commission in the Commission's letter dated June 15, 1978.
>
> c. Whether in its over-the-air fund raising broadcasts on KHOF-TV, Faith Center, Inc., violated or is in violation of, Title 18, United States U.S.C. Section 1343.

An issue was also specified to determine which of three applicants, on a comparative basis, would best serve the public interest. *See Central Florida Enterprises, Inc.* v. *FCC*, 683 F.2d 503 (D.C. Cir. 1982).

5. A pre-hearing conference was held on June 17, 1982, nearly two months after the application had been designated for hearing. Tr. 1–67. In response to a question from the Administrative Law

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[1] See *Faith Center, Inc. KHOF-(TV)*, 82 FCC 2d 1 (1980), *recon. denied*, FCC 81–235 (1981), *aff'd sub. nom. Faith Center, Inc.* v. *FCC*, D.C. Cir. Nos. 81–1648 and 1649, April 7, 1982, *reconsideration and rehearing en banc denied* June 22, 1982

Judge, Faith Center's counsel indicated that it would not comply with discovery or deposition requirements in the proceeding:

> Judge Kuhlman: If you are telling me right now that you do not intend to comply with the discovery requests of the Bureau again and that you do not intend to participate in this proceeding or follow my orders in this proceeding, then state so right now. Mr. Roberson.
>
> Mr. Roberson: On constitutional grounds I would like to do so.
>
> Judge Kuhlman: You do not intend to?
>
> Mr. Roberson: On constitutional grounds, thats correct. (Tr. 11)

In response to another question Faith's counsel indicated that its president, its officers, and board of directors would not be made available for depositions in the proceedings. Tr. 33–35. After reminding counsel of the serious consequences of the previous failure to participate in discovery in the San Bernardino proceeding the ALJ gave Faith an additional ten days to submit a brief setting forth its constitutional arguments. A 32 page brief entitled "Constitutional Issues" was filed by Faith on June 30, 1982, to which was attached Faith's 35 page "The Theology of Giving," which had been previously submitted in the San Bernardino proceeding. On July 13, the Broadcast Bureau filed its Comments on Constitutional Issues.[2]

6. Meanwhile the Broadcast Bureau had proceeded with discovery and on June 17, filed a motion for production of documents. Faith opposed this motion on June 30, and in a Memorandum Opinion and Order, FCC 82M-2108, released July 8, the Administrative Law Judge considered Faith's objections and then ordered it to produce the documents by July 15, 1982. The Bureau also propounded written interrogatories on June 17. Faith did not respond, but it did seek an extension of time until July 15, 1982 to respond. By Memorandum Opinion and Order, FCC 82M-2175, the ALJ granted the motion for extension of time. Thus, July 15 was established as the date for Faith to produce the documents and to respond to the Bureau's interrogatories.

7. On the due date Faith did not produce any of the requested documents nor did it provide the information requested in the interrogatories. On July 22, it did file a late "Response to Broadcast Bureau's interrogatories proposed June 17, 1982." The Bureau,

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[2] On June 30, 1982, Faith also filed (1) a Motion to disqualify the ALJ pursuant to 5 U.S.C. 556; requesting that administrative guidelines for disqualification of ALJ be promulgated, and in the alternative, motion for evidentiary hearing, and (2) "Motion to recuse the Broadcast Bureau or in the alternative a voir dire hearing to ascertain the facts surrounding the Broadcast Bureau's misconduct." Those motions were denied by Memorandum Opinion and Order, FCC 82M-2375, released August 3, 1982, which also considered Faith's constitutional arguments.

which did not consider the pleading responsive, then moved to compel a response on August 9, 1982. On the other hand, the competing applicants, Inspiration Media and Coronado Broadcasting, filed a joint motion to dismiss Faith's application on August 18, 1982.

8. The motion to dismiss relied on Faith's pre-hearing conference statement that it would not comply with discovery and the fact that it had now failed to comply. Although Faith sought to justify its refusal to respond on constitutional grounds, the competing applicants referred to the ALJ's previous rulings that the constitutional arguments had been considered and rejected by the Commission citing FCC 82M–2108, released July 8, 1982; Tr. 6–7, 10, 12–13. Moreover, the Commission's decision had been affirmed by the Court which stated: "This Court is in agreement with the result reached by the Commission generally for the reasons given by it in *Faith Center, Inc.*, 82 FCC 2d 1 (1980)." (See Note 1, above.) This motion to dismiss was granted by the ALJ in a Memorandum Opinion and Order, FCC 82M–2746, released September 13, 1982; Faith's renewal application for its Los Angeles FM radio station was dismissed; and the Bureau's motion to compel was dismissed as moot. And this appeal followed.

DISCUSSION

9. The issue may emerge in perspective if we dispose of some preliminary matters (minor nuisances) which distract attention from the real controversy. These matters include Faith's motion to disqualify the Review Board, the ALJ, and recuse the Bureau; Faith's alleged use of "scandalous language" in some pleadings, and its failure to properly file a supplemental renewal application.

10. On October 27, 1982, the Board ruled on Faith's motion to exceed the five page limitation on its appeal. In that ruling, the Board is alleged to have prejudged the merits of this appeal, relied impermissibly on the unpublished decision of the D.C. Circuit Court in the San Bernardino proceeding, and was vague about the relevancy of certain issues which Faith desired to raise. Ordinarily, this type of appeal shall be filed *five* days after the release date of the offending order, and shall be confined to *five* pages. 47 CFR 1.301(c)(3) and (5). Here the Board granted Faith two extensions of time totally some forty-four days to prepare its appeal. Faith also requested that it be allowed to file a fifty instead of a five page appeal as contemplated by the rules. We granted leave to file a fifteen page appeal. Our action in extending both the time and the page limitation was designed to afford Faith ample time and enough space so that its counsel could refine the issues and sharpen its arguments as the case advanced through the adjudicatory process. We did not grant Faith all the space it requested because experience teaches that while more time may assist parties in refining and sharpening their pleadings, overly generous limits on space seem to

tug them in the opposite direction. See Judge McGowan's *Judicial Review of Administrative Action*, 20 Ad. Law Rev. 169–174 (1967) and *Gross Telecasting, Inc.*, FCC 82R–63, 92 FCC 2d 204, released November 10, 1982, 52 RR 2d 851, 853 note 3. Nor did we prejudge or improperly intend to limit the scope of Faith's appeal when, ruling on the request for extension of time, we stated specifically that "*[W]ithout deciding the matter at this time, it appears* to the Board that a number of these questions have been resolved previously in the proceeding in which the D.C. Circuit Court of Appeals affirmed the Commission's dismissal of Faith Center, Inc.'s KHOF-TV renewal application. *See Faith Center, Inc.*, 82 FCC 2d 1 (1980), *recon. denied*, FCC 81–235 (1981). In addition, other matters you list do not *appear* to be within the scope of the issues discussed and decided in the order that is being appealed." (Emphasis added) We did cite a published Commission decision and noted the Court's affirmance. It is neither novel nor impermissible for this Board to take cognizance of related and pertinent Commission actions. On the contrary, we are obliged by statute, rules, and past practice to follow and apply Commission precedent, and cannot make new policy, or modify old policy. *See Horne Industries, Inc.*, FCC 82R–68, 91 FCC 2d 1193, released November 26, 1982, paras. 1, 9. Accordingly, we will not disqualify ourselves.

11. The ALJ's dismissal order should be reversed, Faith tells us, because he failed to disqualify himself, or certify the matter to the Commission. (Appeal, paras. 2–10). In a companion case involving the renewal hearing of Faith's San Francisco television station, the same ALJ did certify Faith's disqualification request to the Commission. *See Faith Center, Inc.*, FCC 82–533, released December 10, 1982. In that certification to the Commission "the ALJ incorporated the reasons stated in his ordes rejecting virtually identical" disqualification requests in our Los Angeles proceeding. FCC 82–533, para. 6. After considering Faith's arguments in considerable detail the Commission recently found them to be totally without merit. *Id.*, para. 21. That reasoning and ruling is equally applicable here. The refusal to recuse the Broadcast Bureau is also challenged (Appeal paras. 11–15), but we agree with the ALJ's ruling on this point, (Note 2 above, FCC 82M–2375, at paras. 7–9). His reasoning closely parallels that of the Commission in the San Bernardino proceeding, 82 FCC 2d at 31–32.

12. Faith contests the rulings that its counsel used scandalous language in its pleadings (Appeal para. 16–20, and *Anti-Defamation League* v. *FCC*, 403 F.2d 169, 172 (D.C. Cir. 1968)) and failed to file a supplemental renewal application as required by the Commission (Appeal at paras. 21–27). In reviewing the record we have found that the motion to dismiss which the ALJ granted did not rely on these two points. These matters are not essential to the ALJ's ruling, or to our disposition of Faith's appeal, and this Board order in no way

rests on these grounds. We now turn to the heart of the matter and the real issue.

13. This confrontation began half a decade ago when Faith first refused, on constitutional grounds, to respond to Commission requests for documents, videotapes, and other information. It was later warned that a continuing refusal would lead to a renewal hearing. *See Faith Center, Inc.*, 69 FCC 2d 1123, 1127 (1978). The Commission then designated Faith's San Bernardino license renewal for hearing in 1978 leading to the dismissal of that application in 1981 for failure to produce the requested information during discovery and the Court's affirmance of the Commission's decision in 1982. Faith's renewal application of its Hartford television station was designated for hearing in 1980. Again the information was not produced because the Commission approved Faith's request for a distress sale. See para. 4 above.

14. The present case which involves the license renewal of a third station licensed to Faith, an FM radio station in Los Angeles, takes on a complicating dimension because of the presence of two competing applications filed in 1977 and 1980. Competing applicants are entitled to a speedy and thorough comparative hearing to establish which is the best qualified proposal. *See Central Florida Enterprises, Inc.* v. *FCC, supra.* After a delay of several years the Los Angeles renewal and the competing applications were consolidated for a comparative hearing in April of 1982. The parties were given ample notice to prepare for the prehearing conferences on June 17, 1982. At that conference Faith's counsel candidly announced that it would continue to stand on its constitutional arguments and not participate in the discovery phase of the case. Nor would it produce relevant witnesses for depositions. In response to several written Bureau requests, interrogatories, and ALJ discovery orders, Faith in fact did not produce the requested information, even after its time for responding was extended to July 15.

15. At this point in the litigation, some four months after the case had been set for hearing, Faith's competitors on August 18, 1982 moved to dismiss for failure to prosecute, citing 47 CFR 73.3568. Under these circumstances, the ALJ's order granting the motion to dismiss was reasonable, within his discretion, and fully consistent with agency precedent and practice. *See Pan American Broadcasting, supra*, 89 FCC 2d at 170–171, and *Sco-Kim, Inc., supra*, 90 FCC 2d at 963. The other applicants in this case were entitled to a prompt resolution of both the basic and comparative qualifications of all applications. *See Fidelity Television, Inc.* v. *FCC*, 502 F.2d 443 (D.C. Cir. 1974) and 515 F.2d 684 (D.C. Cir. 1975).

16. A proper balance was struck in this case between the need to protect the integrity of the hearing process and individual rights while insuring that scarce broadcast facilities are granted to the best applicants. Faith was afforded several opportunities by the ALJ to

make its constitutional arguments orally and in writing. When it became crystal clear that Faith would not participate in discovery, an important procedural device for expediting resolution of hearings, *Pan American Broadcasting, supra*, 89 FCC 2d at 170, the ALJ acted in a reasonable manner when he granted the motion to dismiss. Faith's refusal to participate in prehearing discovery frustrated the efforts of the ALJ and other parties to proceed with the trial of this case in a timely fashion. It justified the dismissal of the application for failure to prosecute, and "reasonable discretion must be vested in the officer who guides the course of the proceedings." *N.L.R.B.* v. *Phaostron Instrument*, 344 F.2d 917, 920 (9th Cir. 1965).

17. At the heart of Faith's appeal to us, paras. 28–46, is a concise summary of the constitutional argument which it fully articulated before the ALJ in its 32 page constitutional brief and related document "Theology of Giving." These arguments have been compared with the arguments considered and rejected by the Commission in the San Bernardino proceeding. See 82 FCC 2d at 17–21. Our own analysis has convinced us that Faith's competitors, the Bureau, and the ALJ are correct. The Commission has previously ruled on the basic constitutional arguments, and this Board is obliged to follow such prior Commission precedent, para. 10 above. However, Faith has preserved its point both at the hearing and in this appeal. It can now move to higher authorities which have full discretion to re-examine Faith's arguments. 47 CFR 1.115 and 47 U.S.C. 402(b); see also McGowan, *Judicial Review of Administrative Action, supra*, 20 Ad.Law Rev. at 173. While the applicants are free to continue this litigation, they can also attempt to settle their differences. And Congress has recently recognized that settlements can serve both the private and public interests. *See* Sections 311(c) and 311(d) of the Communications Act as amended; Conference Report, No. 97–765, 97 Cong. 2d Sess. pp. 49–50; Matthew 5, 22–26.

18. ACCORDINGLY, IT IS ORDERED, That the Motion to Disqualify the Review Board filed November 12, and supplemented November 18, 1982 by Faith Center, Inc. IS DENIED; and its Appeal, filed November 4, 1982, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,

JOSEPH A. MARINO, *Chairman, Review Board.*

Application, Dismissal of
Failure to Prosecute
Remand

> Where an ALJ dismisses an application for failure to prosecute solely because of a late exchange of hearing exhibits that occurred at least 26 days before the scheduled hearing date, the Review Board reinstates the application and remands the case for a full comparative hearing.
> –*Lyman S. Cox, Jr.*
> PR Docket No. 82–545

FCC 83R–4

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
LYMAN S. COX, JR. Owensboro, Kentucky	PR Docket No. 82–545 File No. 336–A–RL–111
AYER FLYING SERVICE, INC. Owensboro, Kentucky	PR DOCKET NO. 82–546 File No. 224–A–L–12
BULLFROG, INC. Owensboro, Kentucky For an Aeronautical Advisory Station to serve Owensboro- Daviess County Airport, Owensboro, Kentucky	PR DOCKET NO. 82–547 File No. 258–A–L–121

MEMORANDUM OPINION AND ORDER

(Adopted: January 14, 1983; Released: January 18, 1983.)

BY THE REVIEW BOARD:

1. Lyman S. Cox, Jr. (Cox), Ayer Flying Service, Inc. (Ayer), and Bullfrog, Inc. (Bullfrog) each filed an application for authority to operate an aeronautical advisory station (commonly called a unicom) in the Aviation Services at the Owensboro-Daviess County Airport in Owensboro, Kentucky. Cox sought renewal of its current station license (Station KQN4), while Ayer and Bullfrog filed for a new station authorization. Because Section 87.251(a) of the Commission's Rules, 47 CFR 87.251(a), provides that only one unicom may be authorized at an airport, the applications are mutually exclusive and

were designated for hearing on the standard comparative issues by Order, No. 5689, released August 10, 1982. By Memorandum Opinion and Order, FCC 82M-3387, released November 1, 1982, presiding Chief Administrative Law Judge Lenore G. Ehrig (ALJ) dismissed the Cox and Ayer applications for failure to prosecute, pursuant to Section 1.961(b) of the Rules, 47 CFR 1.961(b), granted Bullfrog's application, and cancelled the scheduled evidentiary hearing. Now before the Review Board is a timely-filed appeal by Ayer, pursuant to Section 1.302 of the Rules, 47 CFR 1.302, in which it requests that its application be reinstated and that the proceeding be remanded for hearing. Ayer's appeal is opposed by Bullfrog and by the Private Radio Bureau. The Board has reviewed the ALJ's challenged ruling in light of all of the pleadings and correspondence that have been filed—the record in this case—and concludes that the ALJ erred in dismissing Ayer's application and that Bullfrog's and Ayer's applications must be remanded for the full comparative hearing that is presently required by the Commission's Rules, the Communications Act, and case precedent.[1]

2. The courts have acknowledged the need for demanding compliance with the Commission's procedural rules to protect the interests of orderly administration and finality. *E.g., Civic Telecasting Corp.* v. *FCC*, 523 F.2d 1185 (D.C. Cir. 1975) (per curiam). And the Review Board has held that a presiding officer has great latitude and discretion in regulating the course of a hearing, including prehearing phases. *Pan American Broadcasting Co., Inc.*, 89 FCC 2d 167, 50 RR 2d 1546 (Rev. Bd. 1982). However, "the prehearing requirements are not to be wielded with Draconian, mechanical, or insensitive finality." *Id.*, 89 FCC 2d at 170, 50 RR 2d at 1548. In this case the record strongly suggests that there was an unseasonable rush to judgment, and administrative due process was lost in the shuffle.

3. It cannot be gainsaid that unicom applications are small potatoes in the mega-field of private radio applications and mass communications in general. But an applicant's right under *Ashbacker Radio Corp.* v. *FCC*, 326 U.S. 327 (1945), to vie for a radio frequency in a comparative proceeding is not limited by the size or value of the station at issue. While it is true that a recent amendment of Section 309 of the Communications Act gives the

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[1] We need not reach the question whether Cox's application should be remanded because Cox has not appealed the dismissal of its application. Hence, while the ALJ's ruling is final as to Cox, Section 1.302(b), 47 CFR 1.302(b), Cox may continue to operate Station KQN4 until such time as another entity receives an appropriate authorization to operate a unicom at the Owensboro-Daviess County Airport. This period of interim operation is to be administered by the Private Radio Bureau. See Section 87.251, 47 CFR 87.251, and *Joseph Bahr*, FCC 83R-2, released January 12, 1983.

Commission the authority to use a system of random selection or lottery for initial licensing of all types of radio stations,[2] and while the Commission has adopted a *Second Notice of Proposed Rule Making in Gen. Docket No. 81-768*, FCC 82-420, released October 7, 1982, 47 Fed. Reg. 45046, in which it proposes *inter alia* (at paragraph 14) to use random selection for initial unicom grants, the subject proceeding was not originally an initial licensing proceeding (but rather a comparative renewal case), and even if it be so regarded now (because of Cox's dismissal), the lottery rulemaking has not yet been concluded. Thus, Ayer's *Ashbacker* rights remain intact, at least for the time being. Nevertheless, comparative unicom proceedings are relatively rare, in large part because the Bureau usually is successful in cajoling the would-be participants into working out a mutual agreement whereby one applicant becomes the unicom licensee and agrees to allow the others to operate a dispatch point, as provided in Section 87.75(e) of the Rules, 47 CFR 87.75(e), which effectively permits everyone to offer the services they wish, albeit under the supervision of the licensed control point operator.

4. The Bureau is to be commended in this proceeding for making two pre-designation efforts to bring about the above-described type of settlement agreement, via letters dated March 30 and May 26, 1982. Indeed, it is Ayer's and Bullfrog's responses to these efforts, as well as to the ALJ's crucial prehearing order (see paragraph 5, *infra*) that convinces us that Ayer has prosecuted its application in good faith and ought not to be dismissed. In response to the Bureau's first letter, Cox expressed its willingness to allow Ayer and Bullfrog to operate a dispatch point (letter dated April 5, 1982), Ayer asserted that it would be willing to operate a dispatch point "should Bullfrog, Inc. . . . be willing to cooperate in this manner" (letter dated April 5, 1982), and Bullfrog replied, "It is unlikely that an agreement among the applicants will be reached prior to the hearing . . . . " (letter dated April 7, 1982). By letter dated April 23, 1982, Bullfrog counterproposed that Ayer could operate a dispatch point from *Bullfrog's* licensed operation, but was silent about itself operating a dispatch point from Cox's or Ayer's operation. Finally, in response to the Bureau's second settlement inquiry, Bullfrog reported (letter dated June 11, 1982), "[N]o agreement has been reached . . . . It is apparent it will be necessary to conduct a hearing and we request that same be scheduled as soon as possible." While Ayer's April 5 letter demonstrated a desire to either settle the case or prosecute it through hearing, Bullfrog's position in all three of its letters was essentially that it would settle for nothing less than receiving a grant of the unicom license itself, which could not occur without a comparative hearing.

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[2] Communications Amendments Act of 1982, P.L. 97-259, Section 115, enacted September 13, 1982.

5. Following hearing designation, the ALJ issued an Order Prior to Prehearing Conference, FCC 82M–2519, released August 18, 1982, in which she specified that hearing exhibits should be exchanged on or before October 5, 1982 and lists of witnesses desired for cross-examination, on or before November 2, 1982. In note 2 of the Order, the ALJ cautioned that the exchange dates "are not the dates this material is to be placed in the mail. Rather, they are the dates the various documents must be in the hands of the competing applicants, Bureau counsel and the Presiding Judge." The ALJ received Bullfrog's exhibits on October 5 and Ayer's on October 14 (along with a motion to allow late exchange of exhibits). Also on October 14, the ALJ received Bullfrog's October 7, 1982 motion to dismiss Ayer's and Cox's applications because of their failure to exchange exhibits on October 5. On October 15, the Bureau filed comments on Bullfrog's motion to dismiss and Ayer's motion to allow the late exchange of exhibits. The Bureau noted Ayer's contention that Ayer had not received Bullfrog's exhibits until October 6—one day late—but thought that this was a *de minimis* breach of the ALJ's Order. On the other hand, the Commission's receipt of Ayer's exhibits 9 days late—the only alleged evidence of failure to prosecute on Ayer's part—represented "such disregard for agency procedure," according to the Bureau, as to justify dismissal of its application. Bur. Comments, p. 2.

6. The challenged dismissal ruling summarily adopted the Bureau's and Bullfrog's Draconian logic. It is not surprising that neither the ALJ, nor the Bureau, nor Bullfrog cited a single supporting case for this rather astounding rebuff to Ayer's tardiness, for none exists. While it is true that occasionally the Commission dismisses or denies an application for failure to prosecute,[3] this is a very grave step and we know of no case in which the sole basis for dismissal was a late exchange of exhibits. Such a result appears particularly unreasonable, where, as here, the exchange occurred at least 26 days before the scheduled hearing date (November 9, 1982) and Ayer has made the unrebutted assertion (Appeal, p.2) that it hand-delivered its exhibits to Bullfrog on October 7—only two days late—and mailed them to the Commission on the same day.[4] Clearly

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[3] *E.g., Sco-Kim, Inc.*, 90 FCC 2d 960, 51 RR 2d 1427 (Rev. Bd. 1982) (failure to respond to a number of important motions, non-responsive answers to others); *Pan American Broadcasting Co., Inc., supra* (failure to exchange exhibits or prove financial qualifications and lack of air hazard); *Lebanon Valley Radio*, 11 FCC 2d 31, 11 RR 2d 998 (Rev. Bd. 1967) (failure to exchange exhibits or offer evidence on qualification issues).

[4] Ayer's motion for late acceptance of exhibits was dated October 7, 1982, and in Bullfrog's response to Ayer's appeal (p. 3), Bullfrog concedes that Ayer mailed the motion and exhibits to the Commission on October 7. Moreover, we note that Ayer's list of witnesses for cross-examination was received by the ALJ on November 1, 1982—one day early—and Bullfrog's list was received on November 3—one day late. While these latter events occurred after the ALJ acted, they

no prejudice to Bullfrog or delay of the hearing could have resulted from this slight deficiency.

7. Thus, we reluctantly conclude that the ALJ abused her discretion by dismissing Ayer's application solely because of somewhat late filed exhibits,[5] Section 309 of the Communications Act, the *Ashbacker* case, and fair play require that this case be remanded for a full comparative hearing, absent settlement or appropriate Commission rulemaking action (see paragraph 3, *supra*).

8. ACCORDINGLY, IT IS ORDERED, That the "Appeal of Ayer Flying Service, Inc. From Presiding Officer's Final Ruling," filed November 30, 1982, IS GRANTED, and that this proceeding IS REMANDED for a full comparative hearing between the applications of Ayer Flying Service, Inc. and Bullfrog, Inc. on the issues specified in the original hearing designation order and for the preparation of an appropriate Initial Decision.

9. IT IS FURTHER ORDERED, That Lyman S. Cox, Jr., IS AUTHORIZED TO CONTINUE TO OPERATE Station KQN4 at the Owensboro-Daviess County Airport, pending further order of the Commission.

FEDERAL COMMUNICATIONS COMMISSION,
JEROLD L. JACOBS, *Member, Review Board.*

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further contradict any reasonable conclusion that Ayer had ceased to prosecute its application or that a choice among applicants in this case may soundly be based on punctuality alone.

[5] Unfortunately, it appears from the Bureau's opposition to Ayer's appeal that it deems holding comparative hearings on unicom applications to be a poor use of time and money "[w]hen the Government in generjal and the Commission in particular are striving to 'do more with less'" (p. 7), and was looking for any excuse to terminate this proceeding early. Fortunately for Ayer, this economic judgment must yield to the higher concern that justice be done in accordance with law.

Domestic Public Land Mobile Radio Service, Need for

In hearing matter of application for additional location to reuse six presently authorized DPLMRS UHF channels, Review Board affirmed ALJ's grant. Applicant demonstrated need for its proposal. ALJ did not err in failing to make findings on an alternative engineering proposal submitted by a competitor since the evidence was not germane to the designated issue.
–Mobile Telephone, Inc.
CC Docket No. 81-67

FCC 83R–7

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of

MOBILE TELEPHONE, INC.

For an additional location for two-way Station KOE252 to operate on presently authorized channels 454.125 MHz, 454.225 MHz, 454.275 MHz, 454.300 MHz, 454.325 MHz and 454.350 MHz, in the Domestic Public Land Mobile Radio Service (DPLMRS), at Pine Meadow Peak, (near Coalville), Utah

CC Docket No. 81-67
File No. 20186–CD–P–6–79

Appearances

Louis Gurman and *Jerome K. Blask*, on behalf of Mobile Telephone, Inc.; *Harold Mordkofsky* and *Chase Libbey*, on behalf of Industrial Communications; and *James O. Juntilla* and *Frederick F. Fitzgerald* on behalf of the Common Carrier Bureau, Federal Communications Commission.

DECISION

(Adopted: January 21, 1983; Released: January 27, 1983)

BOARD CHAIRMAN MARINO FOR THE REVIEW BOARD:

1. A trial-type hearing was held on the application of Mobile Telephone, (Mobile) a radio common carrier which presently provides two-way mobile telephone service to the Salt Lake City area over six UHF frequencies at Farnsworth Peak, Utah. Mobile seeks

authority to reuse these frequencies at Pine Meadow Peak, Utah, located some twenty miles east of Salt Lake City. Its proposal would permit wide area service from Salt Lake City to the resort communities east of the Wasatch Mountain Front, primarily Coalville, Utah. Based on the hearing record, Administrative Law Judge Conlin granted Mobile's application, concluding that it had demonstrated need for all six UHF frequencies and had shown that it could not accomodate this need with the VHF frequencies previously granted. Initial Decision, FCC 82D–48, released June 28, 1982. Exceptions to the Initial Decision were filed on August 11, 1982, by David R. Williams d/b/a/ Industrial Communications (Industrial), a mobile service competitor and party to this proceeding, and reply briefs were filed on September 2 and 8, 1982, by the Common Carrier Bureau and Mobile, respectively. We have reviewed the Initial Decision in light of the record, the exceptions, replies, and oral argument held November 12, 1982. In essence, we adopt the ALJ's findings of fact and affirm his conclusion that grant of the six frequencies requested by Mobile is in the public interest.

2. *Background*. Mobile proposes to provide a wide area service from Salt Lake City to the resort communities east of the Wasatch Mountain Front. Additionally, its proposal would enhance the quality of service in the eastern portion of its presently authorized service area by eliminating "dead spots" caused by area terrain. Tr. 190. Its Salt Lake City-Coalville facilities are proposed to operate as a single six-channel wide-area improved mobile telephone service. MT. Exh. 1, p. 4. Each mobile unit would have access to all six channels and would be able to place or receive a call if any of the six channels were not being used. *Id.* at p.3. Since operation of a frequency at either the Farnsworth Peak site or Pine Meadow Peak site would preclude its operation at the other, due to their proximity, the existing channel loading at Salt Lake City would impact directly upon usage of the facility at Coalville. *Id.* at p. 6.

3. Mobile's showing of need for its proposed service rests primarily on the following: (a) its public need surveys of potential subscribers in Coalville and adjacent communities and its current UHF subscribers in the Salt Lake City area; (b) a traffic loading analysis of existing UHF and VHF operations in Salt Lake City; and (c) a Report and Order of the Utah Public Service Commission. With specific respect to (a), the Coalville area need survey, forty-four of fifty potential subscribers interviewed responded positively to the proposal. Of these persons, twenty-seven resided within the proposed UHF contour; the remainder lived within the VHF contour. Of those twenty-seven, twenty-six indicated that they had a need for service into Salt Lake City. Also, the need survey of Mobile's Salt Lake City UHF subscribers revealed that seventy-two of ninety-one individuals interviewed (fifty-eight percent of the current subscribers were interviewed) indicated a need for a mobile service that would span

both sides of the Wasatch Mountain Front. The latter interviews were conducted over the telephone, primarily by Lon Kennert, Mobile's general manager, under the supervision of Michael Schwartz, president of a telecommunications consulting firm. As to (b), its traffic loading studies indicated that less than full duplication of Mobile's existing UHF channels at Pine Meadow Peak would increase the probability of blocking on both UHF and VHF calls placed in the Coalville area. MT. Exhs. 5 and 6. And (c), the Utah Public Service Commission Report specifically found a need for Mobile's proposed service after conducting a full hearing. MT. Exh. 7.

4. *Contentions*. Industrial's argument principally goes to whether Mobile has established a need for its proposed service. It attacks the two public need surveys submitted by Mobile on the grounds that they lack credibility. Specifically, Industrial argues that the ALJ erred in admitting into evidence the survey of existing Salt Lake City UHF subscribers since eighty percent of the telephone interviews were conducted by Kennert outside the presence of Schwartz, and Kennert was not available for cross-examination. The need survey of the Coalville area was also allegedly defective and should be discounted on the grounds that several respondents indicated they had two primary residences, that the survey forms of two cabinet workers were identical, and that some of the respondents indicated a need for an "incredibly high" usage. Industrial contends that Mobile's application does not qualify as a fill-in proposal and must therefore show a local need for all of the requested six channels. Twenty-seven potential subscribers at the Coalville area are not sufficient to demonstrate such a need, particularly since two new VHF channels were granted in the designation order. Additionally, it argues, an award of six UHF channels would be at odds with the Commission's *Further Notice of Proposed Rulemaking* in CC Docket 20870, 84 FCC 2d 857, 863 (1981), which sets four channels as the maximum number that can be granted to an applicant at one time. It urges that the ALJ erred in failing to make findings on evidence it presented to show the feasibility of independent co-channel operation from Farnsworth and Pine Meadow Peaks as an alternative to MT's proposal. Finally, it argues that the ALJ erred in giving "considerable weight" to the Utah Public Service Commission's finding of need for Mobile's service. It acknowledges, however, that any finding made by the state commission may be "persuasive." For its part, the Bureau, although it originally recommended in its proposed findings that Mobile be awarded four channels rather than six, takes no issue with the ID's conclusion because it believes it to be reasonable.

5. *Discussion*. Industrial's arguments are insufficient to undermine the ALJ's sound and reasonable Initial Decision. Addressing the credibility questions first, we conclude that the ALJ properly

credited the public need surveys. The non-availability of Kennert for cross-examination did not provide cause for striking the need survey of Mobile's current UHF subscribers as suggested by Industrial. Kennert was not requested to appear for cross-examination in this proceeding. Moreover, the need survey was conducted under the supervision of Schwartz, who was available for cross-examination, and no reason was offered by Industrial to make the ALJ doubt that Mobile conducted the survey or reported the results accurately. *See Cincinnati Bell, Inc.*, 47 FCC 2d 312, 313 (1974), *recon. denied* 49 FCC 2d 218 (1974), *aff'd sub nom. Pocket Phone Broadcast Service, Inc.* v. *FCC*, 538 F.2d 447 (D.C. Cir. 1976). Similarly, the alleged shortcomings in the Coalville area need survey are insignificant and provide no support for discounting the entire survey. In short, no authority has been cited to us which would support discrediting the ALJ's finding that the need survey was competent.

6. With regard to the substance of Mobile's public need surveys, we agree with the ALJ that they, coupled with the finding of the Utah Public Service Commission, and the traffic load studies, establish a need for a UHF wide area service that will link callers on both sides of the Wasatch Mountain Front. The Commission's standards for demonstrating "need" are flexible, as noted in *New York Telephone Co.*, 47 FCC 2d 488, 494 (1974) where the Commission indicated that several types of evidence might be considered persuasive, including the type of need surveys submitted here. The need surveys reflect that nearly eighty percent of the current UHF subscribers interviewed indicated a need for a service that would span both sides of the Wasatch Mountain Front and ninety-six percent of the interviewees living in the proposed UHF service area indicated a similar need. Industrial cites no case support nor offers any persuasive reasons why we should not count Mobile's current subscribers in ascertaining the extent of need for its proposed service. The current UHF subscribers indicated a strong need for the service which is not surprising since the Coalville area, which has a small permanent population, is heavily used on a year round basis by non-residents for recreational purposes. Additionally, we concur with the ALJ that the VHF frequencies previously granted to Mobile will not accommodate the proposed need. The existing UHF subscribers cannot be served on the VHF frequencies unless they are willing to subscribe to both services and travel with two separate mobile units in their cars. MT. Exh. 4, p. 4. None currently does so and there is little likelihood they will do so in the future in view of the fact that over eighty percent of the UHF mobile units are customer-owned and the price range for a mobile unit is $1750 to $3600. MT. Exh. 1, p. 1.

7. We also affirm the ALJ's determination that six UHF frequencies rather than a lesser number, would best serve the public interest. Mobile's UHF traffic load study exhibit illustrates that with

fewer than six channels placed at Pine Meadow Peak, there would be situations where a subscriber would not know what degree of service to expect from call to call. Thus, for example, once the common or duplicated channels were engaged, subscribers in the Coalville area would not be capable of originating calls and, at the same time, outside calls made to them from the telephone network would likely receive no busy signal since the call would attempt to be routed through the available Farnsworth Peak channels which would be nonexistent at Pine Meadow Peak. Initial Decision, findings, para. 9. Additionally, the traffic load studies establish that there would be a significantly greater probability of blocking on calls attempted in the Coalville area than is now experienced at Salt Lake City. MT. Exh. 5, p. 3. We also reject Industrial's claim that a grant of six UHF channels would be at odds with the standards proposed in Docket 20870. As the ALJ correctly pointed out, I.D. n. 6, the standards are inapplicable here since they are to be applied only to applications received on or after June 1, 1981, and this application was filed long before that date. *See Public Notice*, Mimeo 000349, released April 16, 1981.

8. We find no error on the part of the ALJ in not making findings on evidence presented by Industrial regarding the feasibility of independent co-channel operation from Farnsworth and Pine Meadow. As a general matter, a proponent of an application need not rebut or disprove hypothetical engineering alternatives to its proposal. *Cf. WKYR, Inc.*, FCC 63-893, 1 RR 2d 314 (1963); *Mobile Phone of Texas, Inc.*, 75 FCC 2d 249, 261 n. 22 (Rev. Bd. 1979). Here, Mobile proposed one mode of operation. Industrial, its competitor, suggested an alternative engineering proposal which allegedly would be more efficient but would not provide either the wide area or fill-in services proposed by Mobile. We agree with the ALJ and the Common Carrier Bureau that Industrial's alternative is not germane to the designated issue which is whether there is a need for the system sought by Mobile. Nevertheless, the ALJ permitted Industrial to develop such evidence, but the Bureau's proposed findings identified numerous shortcomings and raised substantial questions regarding the feasibility of Industrial's proposal. See Common questions regarding the feasibility of Industrial's proposal. See Common Carrier Bureau's proposed findings, para. 24, 25 and 29. See also reply brief, para. 7. Under these circumstances, since the evidence introduced by Industrial proved to be of little weight, if not completely worthless, the ALJ did not err in refusing to make findings concerning independent co-channel operations. 47 CFR 1.267(b).

9. Proper weight was accorded by the ALJ to the finding of need by the Utah Public Service Commission. Industrial's exception distinguishing "persuasive" from "considerable weight" is not decisionally significant. The Commission has held that it ordinarily gives

great weight to the conclusion reached by a state public service commission regarding questions of need for service and there is no reason not to do so here. *See AAA Answerphone and Doctors Exchange of Hattiesburg, Miss.*, 23 FCC 2d 789, 790 (1970). The Utah Commission's Report thus lends further support to the ALJ's conclusion that Mobile has adequately justified its proposal.

10. One last exception needs to be addressed. Industrial charges that it is unclear whether all of Mobile's UHF subscribers will have access to the six UHF channels requested since Mobile's counsel allegedly advised Industrial's counsel that a low cost option, giving a customer access to only two channels, is available on the UHF system. The exception is denied since it is not based on any cognizable record evidence, nor was it made the subject of a requested issue. In any case, Max Bangerter, Mobile's president, has submitted an affidavit affirming that the two channel option is available only on its VHF system and that every UHF mobile on its system has access to all six channels.

11. In sum, the ALJ's findings are supported by Mobile's surveys of potential use in the service area. Their results have been in effect independently confirmed by a State commission and Mobile has established sufficient need to justify its six channel reuse proposal. Mobile has also shown on the basis of its traffic load studies that some blocking as well as other problems would result if it receives fewer than the six channels requested; thus, the ALJ correctly concluded that the public interest would best be served by a grant of Mobile's application.

12. ACCORDINGLY, IT IS ORDERED, That the application of Mobile Telephone, Inc. (File No. 20186–CD–P–6–79) for an additional location for two-way Station KOE252 to operate on presently authorized channels 454.125 MHz, 454.225 MHz, 454.275 MHz, 454.300 MHz, 454.325 MHz and 454.350 MHz in the Domestic Public Land Mobile Radio Service at Pine Meadow Peak (near Coalville), Utah IS GRANTED, subject to the following condition specified in the designation order:

> This action is without prejudice to and conditioned upon whatever action, if any, the Commission may take as a result of allegations raised in Industrial's complaint against Mobile Telephone Service of Southern Utah, Inc.

JOSEPH A. MARINO, *Chairman, Review Board,*
FEDERAL COMMUNICATIONS COMMISSION.

FCC 82D-48

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of MOBILE TELEPHONE, INC. For an additional location for two-way Station KOE252 to operate on presently authorized channels 454.125 MHz, 454.225 MHz, 454.275 MHz, 454.300 MHz, 454.325 MHz and 454.350 MHz, in the Domestic Public Land Mobile Radio Service (DPLMRS), at Pine Meadow Peak, (near Coalville), Utah	CC Docket No. 81-67 File No. 20186-CD-P-6-79

Appearances

Louis Gurman and *Jerome K. Blask*, on behalf of Mobile Telephone, Inc.; *Robert J. Keller, Harold Mordkofsky* and *Chase Libbey*, on behalf of Industrial Communications; and *James O. Juntilla, Frederick F. Fitzgerald* and *Susan E. Magnotti*, on behalf of the Common Carrier Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOHN H. CONLIN

(Issued June 22, 1982; Released June 28, 1982)

Preliminary Statement

1. This application was designated for hearing by Memorandum Opinion and Order released February 23, 1981 (CC 07117) by the Acting Chief of the Bureau under delegated authority. The order specified the following issues for hearing:

(a) to determine whether there is a public need for the proposed facilities and the extent thereof; and

(b) to determine, in light of the evidence adduced pursuant to the foregoing issue, what disposition of the application would best serve the public interest, convenience, and necessity.

2. Before reaching the ordering paragraphs, the designation order had treated a number of issues raised by a petition to deny filed by David R. Williams d/b/a Industrial Communications (Williams). First, the Bureau granted an application of Mobile Tele-

phone, Inc. (MT) for reuse of two VHF frequencies at Pine Meadow Peak, Utah. It found that more than 50% of the proposed reliable service area lay within the existing reliable service area, and thus qualified as fill-in transmitters (para. 3). Regarding the application here at issue, the Bureau found that the proposed facilities could not be considered fill-in transmitters and that it was therefore necessary to demonstrate local need. The order described MT's need showing in its application and concluded that the applicant had not adequately shown that this need could not be fully satisfied by the grant of the two proposed VHF channels. The Bureau also denied an antenna height-power waiver requested by MT (para. 6). Williams filed a petition for reconsideration of the VHF grant, but this was dismissed by Memorandum Opinion and Order released July 13, 1981 (Mimeo 002141).

3. The designation order also mentioned a complaint by Williams against one of MT's sister companies and decided not to consider his allegations in this proceeding. It concluded, ". . . the partial grant of Mobile's 150 MHz application and any action that may be taken with respect to Mobile's 450 MHz application are without prejudice to and conditioned upon whatever action, if any, the Commission may take as a result of allegations raised in Industrial's complaint against MTSSU" (para. 11). In a Memorandum Opinion and Order (Mimeo 3102) released April 1, 1982, the Bureau denied the complaint. An application for review of this action is now pending before the Commission.

4. Subsequent to designation Williams filed a petition to intervene. This petition was granted by order of the presiding judge released April 21, 1981 (FCC 81M-1225).

5. Prehearing conferences were held on April 20 and July 13, 1981. The hearing was held on July 14 and 15, 1981 at the Commission's offices in Washington, D.C. The record was closed by order released July 31, 1981 (FCC 81M-2376), but was reopened for the purpose of receiving into the record certain information that had been requested of the parties which was not available at the time of the hearing. This material was received and the record closed by order released September 4, 1981 (FCC 81M-2787). Proposed findings of fact and conclusions of law were filed on September 29, 1981 by MT, Williams and the Bureau; replies were filed on October 29 by MT and Williams.

Findings of Fact

The Applicant's Proposal

6. Max E. Bangerter is the president of MT. The company offers mobile service over four VHF and six UHF frequencies operating under call sign KOE252 at Farnsworth Peak, Utah. MT serves 171 UHF mobile units and 106 VHF mobile units on this station. MT's

UHF frequencies are operated as a fully trunked IMTS system while its VHF frequencies are operated as a semi-trunked entity. MT received authority to reuse two VHF frequencies at Pine Meadow Peak at the time this proceeding was designated for hearing (para. 2, *supra*). It also operates a microwave link between Salt Lake City and Pine Meadow Peak to control voting receivers to improve service east of the Wasatch Front (Tr. 171-174).

7. MT seeks to duplicate or reuse its six existing UHF frequencies at Pine Meadow Peak so as to provide a wide area service, allowing subscribers to operate in the area east of the so-called Wasatch Front, primarily the Park City resort area. The area's permanent population is small but the region is heavily used on a year-round basis for recreational purposes (MT Ex. 8; Tr. 178–179). MT at present can provide service into the area, i.e., base station transmissions can often be received by the mobile but the mobile cannot always talk back to the base, particularly if the transmission is from a valley (Tr. 128–132). This is because the Wasatch Front forms a natural barrier between the Salt Lake City area base station and the mobile unit to the east (Tr. 129). The installation of voting receivers has imporved the situation but has not cured it (Tr. 172–173).

8. The service MT proposes east of the Wasatch Front would be a continuation of the IMTS operation now offered in the Salt Lake City area (MT Ex. 1). If implemented, there would be no additional cost to existing subscribers and new subscribers would pay the same rate as present Salt Lake City users (Tr. 160–161).[1]

9. According to the applicant, reusing fewer than all six presently authorized UHF channels at Pine Meadow Peak would cause a deterioration in service to existing customers because of the unique operational characteristics of an IMTS trunked system. As MT engineering witness Jan Jubon testified: "To extend the reliable service area of any fully trunked non-cellular system, all channel service areas must be coincident and uniform" (MT Ex. 5, p. 6). Accordingly, the applicant asserts that anything less than a grant of six channels would render the proposal unworkable and require withdrawal of the application (Tr. 177). In support MT submitted UHF and VHF traffic analyses of its two-way mobile system which indicated that less than full duplication of MT's six existing UHF channels on Pine Meadow Peak would increase the probability of blocking on both UHF and VHF calls placed in the Pine Meadow

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[1] In its application, MT had requested a waiver of the height-power limitation set forth in Section 22.505 of the rules so as to offer service in a larger area, but this was denied in the designation order (paras. 6 and 12). The matter of the larger area was not pursued further in the hearing. MT's grant of authority to reuse two VHF frequencies at Pine Meadow Peak gave it a service area, on these frequencies, roughly equivalent to what the UHF service area would have been had the waiver (and the application) had been granted.

area (MT Exs. 5, 6). Moreover, there is evidence that if fewer than all six channels are duplicated at Pine Meadow Peak, the service quality a subscriber experiences would vary dramatically from call to call (MT Ex. 1, p. 6). For example, if a mobile seized a non-duplicated channel on a call it had initiated or was receiving, then the noise and disruption problems currently experienced in the eastern protion of MT's service area would occur (*id.*). Since channel selection is completed automatically on a fully trunked system, the mobile subscriber is unaware whether a call has been placed on a duplicated or nonduplicated channel (MT Ex. 1, p. 7). A mobile user inside the Pine Meadow Peak service contour and outside the range of Farnsworth Peak would be unable to initiate a call once all common (i.e., Pine Meadow and Farnsworth) channels are engaged (MT Ex. 5, p. 6). At the same time, however, a caller attempting to reach a mobile unit from a landline telephone would probably receive no busy signal because the call would attempt to be routed through the available Farnsworth Peak channels which would be nonexistent at Pine Meadow Peak (*id.*).

Need for the Proposed Service

10. To meet the only issue in the case, that of need for the proposed service, MT relies on surveys conducted by Michael S. Schwartz (in person and by telephone) and by Lon Kennert by telephone (Tr. 211–213). Schwartz is the president of a telecommunications consulting firm and holds a degree in Business Administration (MT Ex. 4). He has conducted about 35 radio common carrier surveys (Tr. 199). His instructions in carrying out the interviews east of the Wasatch Front were to describe the potential UHF service areas; to describe to all interviewees the nature and cost of the service; and to ascertain the prospective need (MT Ex. 4). The interviews were conducted on April 12 through 15, 1981 (Tr. 211–212), in Park City, Heber City, Morgan and Coalville (Tr. 211). Schwartz believed that most respondents were at levels of authority to make financial decisions, and generally asked whether they were so authorized (Tr. 242–243). However, the survey was expressly nonbinding (Bureau Ex. 2; Tr. 242).

11. In conducting the interviews, Schwartz introduced himself to the interviewee, explained that MT had an application before the Commission to extend its service, and that MT wanted to ascertain public need for the service (Tr. 222). The survey questionnaire form (Bureau Ex. 1) was then presented to the respondent with the explanation that it was not a "sales pitch"; any questions regarding the questionnaire form were answered by Schwartz after which he instructed the interviewee "to respond to the form as truthfully as possible" (Tr. 222). The interviewees then completed the form in writing and signed the form (Tr. 222–223).

12. Of 50 persons interviewed, 44 responded positively; 27 of

these reside or do business within the presently proposed UHF contour (representing 27 possible units) and 26 of these had need for service into Salt Lake City (MT Ex. 4; Tr. 237). Seventeen (17) others who responded affirmatively reside or do business outside the presently proposed UHF contour but within the authorized VHF contour; 12 of the 17 need service into Salt Lake City (MT Ex. 4). Five who resided east of the Wasatch Front and whose place of business and business-related travel are centered there said they would use their mobile telephones at least once a week in Salt Lake City (Bureau Ex. 2, pp. 7, 8, 9, 10, 44). Two others answered similarly, but gave no answer with regard to business travel (*id.*, p. 6) or to place of business (*id.*, p. 17). Three indicated they would make 45 calls a week (*id.*, pp. 1, 2, 3). The occupations in which the respondents were engaged included municipal government, real estate, engineering, architecture, cabinetmaking and oil.

13. In addition to the interviews of nonsubscribers conducted by Schwartz in communities east of the Wasatch Front, MT's existing subscribers were interviewed by telephone to determine the "wide-area need" for the proposed service, that is, the need expressed by MT's present customers in Salt Lake City for two-way mobile telephone service from Salt Lake to areas east of the Wasatch Front (MT Ex. 4, p. 1).

14. The telephone interviews were conducted by Schwartz and Kennert, general business manager of MT (MT Ex. 4, p. 1; Tr. 210, 213). To the extent applicable the survey questionnaire forms were used for the telephone interviews. In all 91 of MT's existing UHF subscribers (approximately 58%) were interviewed (MT Ex. 4, p. 3). Among these customers, 72 indicated a need for two-way mobile service throughout the proposed UHF complaint contour, which spans both sides of the Wasatch Front, and that they would use this service at least once a month (*id.*).[2]

15. Jan Jubon, MT's consulting engineer, offered a traffic analysis of MT's existing UHF operation in Salt Lake City (MT Ex. 5). Jubon holds a degree in Electrical Engineering, is a licensed professional engineer in four states, and specializes in land mobile radio stations and systems. Using data supplied by the applicant, Jubon came to a average call length of 1.34 minutes (MPU) and a system congestion of C.24, under Erlang C criteria, with an average waiting time for delayed calls of 0.78 minutes. However, all data were compiled during a nonpeak period. Under MT's proposal, grant of this application would have no effect on Salt Lake City congestion

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[2] It should be noted that while Schwartz testified in the proceeding and was cross-examined at length, Kennert, who conducted most of the telephone interviews, was not present for cross-examination. Nonetheless, since the interviews were conducted under Schwartz' direction and the resulting data compiled by him, this aspect of MT's survey has been credited. *Cf. Cincinnati Bell, Inc.*, 47 F.C.C. 2d 312, 313 (1974).

unless new subscribers are added in the east, in which case congestion would rise (MT Ex. 5). Jubon calculated that if the system is configured so that common channels (both Farnsworth Peak and Pine Meadow Peak frequencies) respond to offered traffic first, as long as any channel is available solely at Farnsworth Peak there would still be capacity in the Salt Lake City area, but none to the east. This led to his calculations (*id.*, p. 3) of waiting time to the east, even if no new subscribers are added. In short the call to or from the east must wait until one of the common channels is vacant before it can be completed. Jubon, using the same analysis, then computed congestion if 18 units are added in the east (*id.*, p. 4) and again with 11 (*id.*, p. 5). Additionally, if a call is made from the telephone network to a subscriber who is east of the Wasatch Front, and all common channels are busy, the call cannot be completed, but the caller may not receive a "system busy" indication, since there may be Farnsworth Peak channels available.

16. Jubon's VHF traffic analysis (MT Ex. 6) differs from the UHF analysis due to the difference in the technical systems. Land to mobile calls go to each unit's assigned "home" channel. However, mobile to land calls may be made by the user selecting any vacant channel. Jubon assumes that new subscribers east of the Wasatch Front will be assigned one of the two channels newly available at Pine Meadow Peak as "home" channels. Using data supplied by the applicant, Jubon arrives at a present average call length of 1 minute (MPU). Applying this to the system with two channels now to be reused at Pine Meadow Peak, and assuming no additional subscribers, he comes to Erlang C criteria of C.44 for land to mobile calls, C.12 for mobile to land at Farnsworth Peak and C.27 at Pine Meadow Peak. If 35 new subscribers are added to the east, these numbers rise, respectively, to C.59, C.27 and C.44. If only 14 new eastern units are added, the figures are C.50, C.17 and C.33. Any of these rates, in his view, would justify additional channels in UHF frequencies.

17. Finally, MT submitted a certified copy of the Report and Order (Case No. 80–047–02) of the Utah Public Service Commission (MT Ex. 7). This order resulted from a Utah hearing on an application to amend its state certificate to provide service to the Pine Meadow Peak area. MT was opposed at that Commission by Williams. After a full hearing, that Commission specifically found a need for MT to expand its service into the Pine Meadow Peak area (*id.*, p. 5).

Williams' Objections

18. David R. Williams is the owner of Industrial Communications and is the licensee of Station KUO647 which offers a trunked, IMTS, seven-channel UHF service in the Salt Lake City area from Kessler Peak and a single channel at Coalville, Utah (Tr. 24–29). The Coalville channel is located at Lewis Peak (Tr. 29) and is controlled

by microwave from Salt Lake City. Williams filed a petition to deny MT's application, and after its designation for hearing he was granted leave to intervene. Williams contends that MT has not made a satisfactory showing of public need for the facilities requested; that a different technical mode of operation could be used by MT; and that the frequencies requested could be better utilized in southwestern Wyoming. It seems evident from the hearing designation order (para. 4) that the only issue to be resolved in this proceeding is whether MT has demonstrated sufficient local need for the facilities requested. The presiding officer does not regard alternative engineering proposals or alternative use of the frequencies applied for as being germane to the question of local need for the proposed service.[3] Although evidence was received on these matters, no findings will be made.

19. On the question of need, Williams' main witness, Dr. Morris Gottlieb, challenged the validity of MT's survey, contending that it was not conducted in accordance with good market survey practice. Specifically, Dr. Gottlieb found that the questions asked by Schwartz tended to be leading and in several instances were ambiguous (Tr. 354–356). He also felt that questions calling for a "yes" or "no" answer contain inherent bias and that it is more desirable to allow for a graduated response (Tr. 356–357). Finally, he contended that where, as here, the person conducting the survey knows its purpose, an element of bias is introduced, consciously or unconsciously (Tr. 358–359). In sum, Dr. Gottlieb was of the opinion that in view of these deficiencies, the results of the survey should be discounted (Tr. 359). Dr. Gottlieb was qualified as an expert in market survey technology (Tr. 351–353) but conceded that he was not familiar with DPLMRS survey practices or criteria for establishing need for the service (Tr. 362–365).

20. Williams, himself, testified that on the basis of his experience as a radio common carrier in Salt Lake City, there was little demand for service east of the Wasatch Front. Despite promotional efforts, Williams has been able to attract only a few subscribers for service between Salt Lake City and areas east of the Front. The record shows, however, that he does not advertise in the telephone directory for communities east of the Front or in the local (Coalville) newspaper (Tr. 68, 441–442).

Conclusions

1. At issue in this proceeding is whether the survey and related evidence submitted by MT is sufficient to establish a public need for its proposal to reuse at Pine Meadow Peak, Utah six UHF channels it is presently authorized to use in Salt Lake City. Intervenor Williams contends that because of shortcomings in MT's survey its

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[3] See *Mobile Phone of Texas, Inc.*, 75 F.C.C. 2d 249, 261, n. 22 (Rev. Bd. 1979).

need showing is inadequate. The Bureau agrees with MT that a public need for the service has been demonstrated but suggests that, initially at least, four channels rather than six be authorized.

2. Commenting on past cases in which the question of need for the proposed service has been considered the Commission recently observed that "the discussions of methodology contained in them are sufficiently vague to invite almost endless argument over the adequacy of any particular need showing . . . [and] afford inadequate guidance regarding the minimum public need required . . . ."[4] Mindful of the uncertainties that exist in this area of Commission law and policy, the presiding officer has concluded that MT's showing is sufficient to warrant a grant of its application. It has provided information on survey methodology, questions asked and representations made. The service area, the nature of the service and its cost were described to those interviewed, and favorable responses were received from a proportionately large number of interviewees. Considerations such as these have been relied on previously in authorizing new service;[5] and since, as the Bureau points out (Proposed Findings, para. 32), the Commission has not established objective standards regarding a licensee's reuse of already licensed frequencies, the presiding officer sees little reason not to credit them here.[6] Finally, in a proceeding in which both MT and Williams participated, the Utah Public Service Commission found a need for the proposed service, a consideration the Commission has in the past given considerable weight.[7]

3. In reaching this conclusion the presiding officer has considered the arguments advanced by Williams in opposition to a grant. Essentially these concern alleged deficiencies in MT's survey: that it was not a scientifically conducted market study; that the expressions of interest from respondents were less than binding commitments; that the interviewer knew the purpose of the survey; and that he sought out likely customers instead of conducting a random sam-

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[4] *First Report and Order re Amendment of Parts 2 and 22 of the Commission's Rules to Allocate Spectrum in the 928–941 MHz Band and to Establish Other Rules, Policies, and Procedures for One-Way Paging Stations in the Domestic Public Land Mobile Radio Service* (FCC 82-202), released May 14, 1982 (para. 34).

[5] See *New York Telephone Co.*, 47 F.C.C. 2d 488, 494, *recon. denied* 49 F.C.C. 2d 264 (1974), *aff'd sub nom. Pocket Phone Broadcast Service, Inc.*v. *FCC*, 538 F.2d 447 (D.C. Cir. 1976); *Cincinnati Bell, Inc.*, 47 F.C.C. 2d 312, *recon. denied* 49 F.C.C. 2d 218 (1974), *aff'd sub nom. Pocket Phone Broadcast Service, Inc.*, *supra.*

[6] There was considerable controversy at the hearing and in the proposed findings as to the applicability of the *Further Notice of Proposed Rulemaking* in Docket 20870, 84 F.C.C. 2d 857 (1981). In a subsequent public notice (Mimeo 000349, released April 16, 1981), the Commission stated that the interim standards set forth in the *Further Notice* would be applied to applications filed on or after June 1, 1981. The instant application was filed long before that date and the presiding officer has concluded that the interim standards are not applicable.

[7] See *AAA Answerphone and Doctors Exchange of Hattiesburg, Miss.*, 23 F.C.C. 2d 789, 790 (1970), and the cases cited therein.

pling of the general population. No cases are cited which hold that a DPLMRS need survey must be discredited where these elements are present. Rather, to the extent clearly articulated standards exist they appear to have been met in the methodology followed by MT's consultant, an individual with considerable experience in conducting such studies. The essential purpose of these showings is to avoid wasteful assignments and the stockpiling of frequencies by requiring the applicant to demonstrate that the facilities sought will be utilized. The study submitted here is sufficient to meet this objective.

4. With regard to the position of the Bureau, the presiding officer agrees with its conclusion that MT has shown it cannot accommodate all traffic with the VHF frequencies previously granted in the hearing designation order; but in view of the evidence set forth in the findings (i.e., para. 9) the presiding officer has determined that a grant of the six frequencies requested, rather than the four suggested by the Bureau, would better serve the public interest.

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the rules, the application of Mobile Telephone, Inc. for an additional location for two-way Station KOE252 to operate on presently authorized channels 454.125 MHz, 454.225 MHz, 454.300 MHz, 454.325 MHz and 454.350 MHz, in the Domestic Public Land Mobile Radio Service at Pine Meadow Peak (near Coalville), Utah, IS GRANTED, subject to the following condition:[8]

This action is without prejudice to and conditioned upon whatever action, if any, the Commission may take as a result of allegations raised in Industrial's complaint against Mobile Telephone Service of Southern Utah, Inc.

JOHN H. CONLIN, *Administrative Law Judge,*
FEDERAL COMMUNICATIONS COMMISSION.

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[8] In the event exceptions are not filed *within 30 days after the release of this Initial Decision,* and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Initial Decision

This initial decision is in reference to Commission's decision in this docket that is printed at 92 FCC 2d 621.
–North Carolina Radio Service, Inc.
BC Docket No. 81–244

FCC 82D-38

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
NORTH CAROLINA RADIO SERVICE, INC. Elizabeth City, North Carolina	BC Docket No. 81–244 File No. BPH-800201AN
CAMPBELL BROADCASTING, INC. Elizabeth City, North Carolina	BC Docket No. 81–245 File No. BPH-800828AJ
TOWN & COUNTRY BROADCASTING, INC. Elizabeth City, North Carolina	BC Docket No. 81–246 File No. BPH-800829AF
For Construction Permit for a New FM Station	

Appearances

Nathaniel F. Emmons, on behalf of North Carolina Radio Service, Inc.; *James P. Riley*, on behalf of Campbell Broadcasting, Inc.; *David Meyers*, on behalf of Town & Country Broadcasting, Inc.; and *Lawrence Bernstein*, on behalf of the Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOHN H. CONLIN

(Issued May 10, 1982; Released May 14, 1982)

Preliminary Statement

1. This proceeding involves the mutually exclusive applications of North Carolina Radio Service, Inc. (NCRS) and Town & Country Broadcasting, Inc. (T&C) for a construction permit for a new FM station in Elizabeth City, North Carolina. A third applicant,

Campbell Broadcasting, Inc., participated in the hearing, but on April 9, 1982 it requested that its application be dismissed. That request will be granted.

2. The following issues were designated for hearing:

> To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications, if any, should be granted.[1] A prehearing conference was held on June 24, 1981 and the hearing took place on September 22 and 23. The record was closed by order on October 28, 1981; the applicants filed proposed findings and conclusions on December 11, 1981 and replies were submitted on January 8, 1982.

Findings of Fact

The Community.

3. The proposed FM station will be licensed to Elizabeth City, North Carolina, a community located in the northeastern part of the state, about 40 miles south of the Norfolk-Portsmouth, Virginia metropolitan area. The station will provide primary service to residents of Elizabeth City and surrounding areas of Pasquotank County, of which Elizabeth City is the county seat. Roughly half the total estimated county population is concentrated in Elizabeth City (14,800 of 29,600).

The Applicants.

4. NCRS is a corporation the stock of which is owned by two principals, Lillian P. Gilliken (49% interest) and James R. Bond, Jr. (51% interest). Ms. Gilliken, a resident of Memphis, Tennessee, is president and one of two directors of NCRS. Bond is a resident of Chevy Chase, Maryland; he is vice president, secretary, treasurer and the other director of NCRS.

5. T&C is a North Carolina corporation the entire stock of which is owned in equal shares by two principals, Joseph E. Revels and Donald W. Christopher. Revels is president and one of two directors of T&C; his residence address is Black Beard Beach, North Carolina. Christopher, a resident of Williamston, North Carolina, is secretary-treasurer and the other director of T&C.

6. Neither the applicants nor any of their principals holds an interest in any medium of mass communications. The principals of both applicants will be employed full time in the management of the proposed stations and both propose an auxiliary source of power.[2]

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[1] An air hazard issue was originally specified against T&C, but this was resolved in favor of the applicant by summary decision (FCC 81M-2815, released September 8, 1981).

There is no other area of comparison on which one applicant seeks a preference over the other. The case therefore turns on whatever distinctions can be drawn between the qualitative aspects of each applicant's integration proposal.

7. *NCRS*. Ms. Gilliken, a 49% stockholder, officer and one of two directors, will be the full-time general manager of the proposed station. As such she will formulate station policies (with Bond), design the station's program schedule, formulate editorial policy and be responsible for the day-to-day administration and supervision of all station operating functions. She will also be directly involved in the production of programs relating to the needs and specialized interests of women. Ms. Gilliken will reside in Elizabeth City and will devote at least 40 hours a week to her work as general manager.

8. Ms. Gilliken, who holds a First Class Radiotelephone Operator License, has attended Georgetown University and the University of North Carolina, where she studied in the Department of Radio, Television and Motion Pictures and worked at "WCAR," a carrier current broadcast facility operated by the student government at the University of North Carolina. She began as a news reporter and announcer and eventually became operations manager and general manager. In the latter position she developed and implemented the station's budget, recruited and trained station personnel and produced several programs. Subsequent broadcast experience includes service as an announcer at WKVO/WKVO-FM, Havelock, North Carolina; director of public affairs at WXYC(FM), Chapel Hill; announcer at WTIK(AM), Durham; chief engineer of WRBX(AM), Chapel Hill; production engineer at WSAZ-TV, Huntington, West Virginia; technician at WPTY-TV, Memphis, Tennessee and later at WREG-TV, Memphis. This experience encompassed the period 1975–1981. Ms. Gilliken's work at "WCAR," WKVO and WTIK was on a part-time basis. The remaining positions, which covered a period of nearly four years, involved full-time employment (NCRS Ex. 4).

9. James R. Bond, Jr. will be the full-time station manager of the proposed station. He will formulate station policies (with Ms. Gilliken) and will be responsible for various administrative and operating functions in the areas of sales, program production, office administration and engineering, including the formulation of busi-

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[2] NCRS objected to the admission of T&C's exhibit regarding auxiliary power on the ground that it constituted a variance from the application. The presiding officer received the exhibit but withheld a ruling on its comparative significance pending further consideration of the variance question. T&C's application made no reference to an auxiliary power source, but upon examination of NCRS's application (pursuant to T&C's request that official notice be taken), it has been determined that NCRS also made no reference to auxiliary power. Both proposals thus stand on equal footing. Whether the proposals are credited or rejected (as would seem to be required by *Athens Broadcasting Co., Inc.*, 17 F.C.C. 2d 452 (Rev. Bd. 1969)), no choice can properly be made between the applicants in this area of comparison.

ness plans and policies. Bond will reside in Elizabeth City and will devote at least 40 hours a week to his work as station manager.

10. Bond is a graduate of the University of North Carolina, where he majored in Radio, Television and Motion Pictures, and holds an MBA from the University of Virginia. He presently resides in the Washington, D.C. area and has been employed since 1979 by a financial consulting firm specializing in broadcasting. He has a First Class Operator License and began working at broadcast stations while still in high school. From 1971 to 1976 he held part-time positions at WRFK-FM, Richmond, Virginia; WEZS(FM), Richmond; WBAG(AM-FM), Burlington-Graham, North Carolina; and at the carrier current station at the University of North Carolina where, like Ms. Gilliken, he served for a time as general manager. From 1975 to 1977 he was employed full time at WTVD(TV), Durham, North Carolina. His experience includes work in the performing, production and technical aspects of broadcasting. In all, it consists of about four years full-time employment in broadcasting and about five years part time (NCRS Ex. 5).

11. *T&C.* Joseph E. Revels, who is president, a director and 50% shareholder of T&C, will be the station's general manager. In that capacity, he will be employed by T&C on a full-time basis. Revels will make the day-to-day managerial decisions of the station in conjunction with the station manager. Donald W. Christopher, who is secretary-treasurer, a director and 50% shareholder of the applicant, will be employed full time as station manager. The general manager and the station manager will share responsibility for the business management and administration of the station. It is anticipated that the general manager will spend a greater portion of his time in the area of sales while the station manager will focus on programming. Neither Revels nor Christopher resides in the Elizabeth City area, but both propose to move there if their application is granted.[3]

12. Revels was employed at WIAM(AM-FM) in Williamston, North Carolina from 1958 through 1969 and again in 1971–1972. He was primarily an announcer and sports reporter but also acquired some experience in sales. Since 1972 Revels has been employed in positions unrelated to broadcasting; he is presently a sales representative for a firm dealing in agricultural products.

13. Christopher has a Bachelor of Arts degree in Radio, Television and Motion Pictures from the University of North Carolina. He worked as a part-time and full-time announcer at WIAM, Williamston, North Carolina in 1960–1961; a part-time newsman/announcer in the early 1960's at WDNC, Durham, North Carolina, and WPTF,

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[3] NCRS argues that there is some doubt as to whether they will live in Elizabeth City itself. Their written testimony specifies Elizabeth City and the transcript references cited by NCRS (Tr. 166, 172) are not contradictory. To the extent any doubt exists, it seems largely attributable to the form of the question asked on cross-examination.

Raleigh, North Carolina; and a full-time employee of WBT, Charlotte, North Carolina from 1964 to 1970. During this time Christopher became sports director at the station and also did some work in the field of sports for WBT-TV. He left broadcasting in 1970 for positions in sales and servicing in unrelated fields.

Conclusions

1. In matters relevant to the comparative issue, there are no differences between the applicants except in certain areas affecting the qualitative aspects of their integration proposals.[4] Even here, however, the applicants are nearly equal: the principals of neither applicant have civic records in the city of license or service area, none is a local resident, but all propose to move to the community in the event their application is granted. The only arguable differences involve broadcast experience and the female ownership represented by NCRS's Ms. Gilliken.

2. Both applicants claim a preference for broadcast experience. T&C contends that its principals have more years of experience while NCRS argues that its stockholders' experience is wider in scope. T&C's Revels and Christopher together have approximately 20 years of experience, acquired largely in the 1960's.[5] They were primarily announcers and sportscasters, with Revels having some experience in sales. Bond and Gilliken of NCRS have about eight years of full-time experience in broadcast or broadcast-related employment and about the same amount in part-time employment at radio stations. Each has held engineering, production and performing responsibilities and has acquired some managerial experience as well. There is thus some support for the claims of both parties; realistically speaking, however, it is difficult to see how in either case the differences would be reflected in terms of "best practicable service to the public." The Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C. 2d 393 (1965), minimized the importance of broadcast experience as an element of comparison because, among other things, it confers only an initial advantage since lack of experience can be cured with time.[6] Thus any advantage that might accrue to T&C from its somewhat lengthier broadcast experience, or to NCRS because its experience is broader, would exist only in the short run. It is concluded, therefore, that these minor transitory differences in the nature of the

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[4] As previously found none of the applicants or their principals have ownership interests in other mass media and both propose to have their principals engaged full time in significant managerial positions.

[5] NCRS argues that the more recent experience of its own principals should be considered more relevant than T&C's, all of which was acquired at least ten years ago. This contention has not been credited. See *New Continental Broadcasting Company*, 88 F.C.C. 2d 830, 847 (Rev. Bd. 1981).

[6] See also *New Continental Broadcasting Company, supra.*

applicants' broadcast experience are insufficient to justify a preference for either party.

3. NCRS is entitled to a preference for proposing the full-time integration of a female 49% stockholder in a key managerial position, that of general manager. *New Continental Broadcasting Company, supra*, at 846; *Gainesville Media, Inc.*, 72 F.C.C. 2d 799, 805–806 (Rev. Bd. 1978). This is but one component of qualitative integration and ordinarily it is not regarded as a matter of major significance. But even "a slight difference may be decisive when greater differences do not exist." *Sacramento Broadcasters, Inc.* v. *F.C.C.*, 236 F.2d 689, 693 (D.C. Cir. 1956). This is the case here: all other relevant factors have been weighed, and no discernible difference between the applicants has been found. In the circumstances, NCRS's proposed female integration is sufficient to warrant a grant of its application.

Accordingly, IT IS ORDERED that the letter request filed on April 9, 1982 by Campbell Broadcasting, Inc. to dismiss its application IS GRANTED and its application IS DISMISSED;

IT IS FURTHER ORDERED that unless an appeal from this Initial Decision is taken by a party or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the rules, the application of North Carolina Radio Service, Inc. IS GRANTED and the application of Town & Country Broadcasting, Inc. IS DENIED.[7]

JOHN H. CONLIN *Administrative Law Judge*
FEDERAL COMMUNICATIONS COMMISSION

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[7] In the event exceptions are not filed *within 30 days after the release of this Initial Decision*, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Coverage, Principal city
Shadowing
Site Availability
Waiver,

> **Where an applicant for major changes in its television facilities would fail to provide a city-grade signal over only 2.9% of its community of license, has made good faith efforts to locate a suitable alternative transmitter site, and proposes to put a station back on the air, the Review Board granted the requested waiver of Section 73.685(b) and authorized the changes.**
> –*Pappas Telecasting, Inc.*
> BC Docket No. 81–494

FCC 83R–1

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of PAPPAS TELECASTING, INCORPORATED (WHNS(TV)) Asheville, North Carolina For Construction Permit for Changes in Television Facilities	BC Docket No. 81–494 File No. BPCT–791030KF

Appearances

John G. Johnson, Jr., and *Peggy Kobacker Shiffrin*, on behalf of Pappas Telecasting, Incorporated; and *Charles W. Kelley* and *Joseph A. Belisle*, on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

DECISION

(Adopted: January 4, 1983; Released:January 6, 1983.)

BOARD MEMBER JACOBS FOR THE REVIEW BOARD:

1. The Review Board has before it for consideration the consolidated exceptions of Pappas Telecasting, Incorporated (Pappas) to the Initial Decision (I.D.) of Administrative Law Judge Walter C. Miller (ALJ), FCC 82D–51, released July 16, 1982, in this proceeding. The ALJ concluded that Pappas' proposed move of Station WHNS(TV)'s facilities to a new transmitter site would cause shadowing over a portion of WHNS' community of license—Asheville, North Caroli-

na—in violation of 47 CFR §73.685(b), and that Pappas had failed to justify a waiver of that rule; hence, Pappas' application for a construction permit to relocate WHNS' transmitter and antenna was denied. We have reviewed the Initial Decision in light of Pappas' exceptions and the Mass Media Bureau's reply brief, the oral argument held October 8, 1982, and the record. While we adopt the ALJ's findings, as modified herein, we disagree with his ultimate disposition and conclude that a waiver of §73.685(b) is justified and that Pappas' application should be granted.

2. Pappas acquired the license of WHNS, Channel 21 (then known as WANC-TV), in September 1979. The station was inoperative upon acquisition, and remains so to this date, because the previous licensee had been evicted from its transmitter site by the site owner. I.D., note 2. In order to reestablish the station, Pappas submitted the subject application for a construction permit to make major changes in WHNS' facilities, including relocating the antenna and transmitter from its presently authorized site on Beaucatcher Mountain in Asheville thirty miles south to Slick Rock Mountain. Because its application was mutually exclusive with that of Carolina Christian Broadcasting, Inc. (CCB), the licensee of WGGS-TV, Channel 16, Greenville, South Carolina, which also sought to make changes in its facilities, the Commission ordered a comparative hearing on the standard comparative issue. Memorandum Opinion and Order, 49 RR 2d 1688, 46 Fed. Reg. 40919, published August 13, 1981. In addition, the Commission designated an issue to determine whether Pappas' proposed site would cause shadowing over a portion of Asheville in violation of §73.685(b), and, if so, whether waiver of the rules would be warranted. Furthermore, the ALJ granted CCB's petition to enlarge the issues against Pappas to include an inquiry into whether Pappas' application would constitute a *de facto* reallocation of the frequency to Greenville and/or Spartanburg, South Carolina. Memorandum Opinion and Order, FCC 81M-3353, released October 22, 1981. Subsequently, however, the ALJ dismissed CCB's application pursuant to a joint settlement agreement, Memorandum Opinion and Order, FCC 82M-0309, released January 29, 1982, thereby obviating the comparative issue and leaving only the shadowing and *de facto* reallocation issues to be tried against Pappas. The issue of *de facto* reallocation was resolved in favor of Pappas (I.D., Conclusions, paras. 11–12), no exceptions were taken to this ruling, and we need not consider it further. We turn therefore to the question of shadowing.

3. Because of obstructions between the proposed site on Slick

Rock Mountain and the city of Asheville, WHNS would fail to provide a city-grade signal of 80 dBu over 2.9% of the city.[1] I.D., Findings, para. 10; Pappas Exh. 1, p. 2. WHNS would, however, place a signal of at least 72.2 dBu over the entire city. Pappas Exh. 1, p. 2. This field strength is slightly short of the minimum Grade A signal level of 74 dBu and far in excess of the minimum Grade B signal level of 64 dBu. 47 CFR §73.683. Prior to selecting the Slick Rock Mountain site, Pappas had searched for other suitable sites but had rejected each one. Three of the sites were eliminated as unavailable, two were rejected for failure to comply with the minimum mileage separation requirements, and one because it was sufficiently distant from Asheville (more so than Slick Rock Mountain) to pose a serious *de facto* reallocation question. Bureau Exh. 3; Pappas Exh. 2. In addition, after selecting the Slick Rock Mountain site, Pappas instructed its engineer to search further for better alternative sites, but this resulted in the rejection of three more sites, two because they failed to cure the shadowing defect, and the third because of potential FAA objections to construction of an antenna so near to a low-altitude airway. *Id.* Unable to find a suitable alternative site, Pappas specified the Slick Rock Mountain site in its application and noted the shadowing problem. On September 14, 1981, one month after hearing designation, Pappas proposed to eliminate the problem by establishing a translator station at Beaucatcher Mountain.[2] Pappas' application, however, was returned because of the Commission's April 13, 1981 freeze on the filing of certain translator applications. Order, BC Docket No. 78–253, 49 RR 2d 433 (1981); I.D., Findings, paras. 6–7.

4. In concluding that Pappas' application violated the shadowing prohibition of §73.685(b) and that Pappas had not met the burden of justifying a waiver of the rule, the ALJ emphasized that WHNS' existing authorization complied with §73.685(b), and, hence, Pappas was essentially "moving from compliance into non-compliance at the expense of some of the residents of the community of license." I.D., Findings, para. 10. Furthermore, he found that Pappas made no predesignation effort to bring his proposal into compliance and that alternative sites did exist which would comply with the rules, such as the Beaucatcher Mountain translator site. I.D., Conclusions, paras. 14, 16. He concluded that "Asheville must have better coverage than Pappas is willing to give it." *Id.*, para. 16.

5. Section 73.685(b) provides that antennas "should be located"

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[1] A shortfall of 2.9% would affect approximately 1,545 persons—assuming the population is uniformly distributed throughout the city—and 0.69 square miles of Asheville's total area of 24.36 square miles (Pappas Exh. 1, p. 2 and Supp., p. 2).

[2] The proposed translator would ensure 80 dBu coverage to all parts of Asheville. Pappas Exh. 1, p. 4. It would not be at the same Beaucatcher Mountain location as WHNS' presently authorized site. Tr. 199–200.

so as "to reduce to a minimum the shadow effect on propagation"—that is, to minimize the weakening of the signal as the result of obstructions in the line-of-sight path between the transmitter and the community of license. Unlike §73,685(a), which sets forth mandatory provisions for minimum signal strength over the community of license, §73.685(b) is admonitory in nature and provides guidance to applicants in site selection but also allows latitude and flexibility in order to accommodate the compromises that frequently accompany the selection of sites. *WSTE-TV, Inc.*, v. *FCC,* 566 F. 2d 333, 338 (D.C. Cir. 1977). Such compromises in site selection are permissible so long as the applicant keeps in view two primary objectives: "the transmission of the required minimum signal over the principal city to be served, and the prevention of as much shadowing within that city as possible." *WHR, The Goodwill Station, Inc.*, 25 FCC 159, 189 (1958). Thus, the question of substantial compliance with §73.685(b) or waiver of its terms is to be judged by a less stringent standard than if the rule were mandatory. *WSTE-TV, Inc.* v. *FCC, supra*; *WSTE-TV, Inc.*, 75 FCC 2d 52, 63, 46 RR 2d 1044, 1052 (1979); *Central Coast Television*, 14 FCC 2d 985, 991, 14 RR 2d 575, 585 (Rev. Bd. 1968). Nevertheless, every waiver request places a burden, a "high hurdle," on the applicant to show—in a particularize, clear, and factually grounded manner—that he is unable to meet the strict terms of the rule, that it would be in the public interest to grant the waiver, and that such a waiver would not undermine the policy embodied by the rule. *WAIT Radio*, v. *FCC*, 418 F.2d 1153, 1156–1157 (D.C. Cir. 1969).

6. Bearing these principles in mind, we believe that the pertinent facts would justify holding that Pappas' proposal is in substantial compliance with §73.685 of the Rules, without the need for waiver, but Pappas presents a convincing basis for waiver of §73.685(b) in any event. *Cf. Wilkes County Radio*, 10 FCC 2d 622, 11 RR 2d 714 (Rev. Bd. 1967). As to substantial compliance, while the Bureau correctly points out that the amount of line-of-sight signal shadowing over Asheville has not been quantified on the record—only that there is a 2.9% coverage shortfall (see note 1, *supra*, and accompanying text)—the Board considers this 2.9% defect in city-grade signal coverage to be *de minimis. Cf. Garo W. Ray*, 36 FCC 1038, 1041 n. 9, 2 RR 2d 399, 404 n. 9 (Rev. Bd. 1964) (4% shortfall in AM coverage may be "substantial compliance"). The applicant would eliminate even this small shortfall by its translator proposal (which may be revived at some future date), and, under a more stringent §73.685(a) issue, the Commission has not regarded a 2.9% coverage shortfall as significant, *WSTE-TV, Inc., supra* (initial 22% defect reduced to 2.9% by translator), nor even an 18% defect, *Arkansas Educational Television Commission*, 45 RR 2d 432 (1979) (no translator requirement mandated to cure 18% defect). Thus, there appears to be ample ground to conclude that Pappas' proposal is in

substantial compliance with §73.685 and is grantable on that basis alone. This view is buttressed by Pappas' waiver showing, which we find decisive and to which we now turn.

7. While an applicant seeking a waiver of §73.685(b) has the burden of showing that a diligent search has not revealed any feasible non-shadowing alternative site, and may not ignore sites which it reasonably should have considered would be available, the applicant need not demonstrate the impossibility of finding any feasible alternative site. *WSTE-TV, Inc., supra*, 75 FCC 2d at 58 n. 13, 59–60, 46 RR 2d at 1049–50 and n. 13; *cf. The Outlet Co.*, 11 FCC 2d 528, 529–30, 12 RR 2d 387, 388–9 (1968). Pappas' examination of nine potential alternative sites and rejection of them because of the varying problems they presented met this standard. Furthermore, in response to the suggestion that its proposed translator site (a tenth site) might be used as the primary transmitter location for WHNS, Pappas submitted a number of exhibits enumerating various reasons why any urban location would be inadvisable for a high-power, high-elevation transmitter and antenna, including blanketing interference, ghosting, biological hazard, and potential local citizen opposition to a 1600-foot tower (compared to an 80-foot translator tower). Pappas Exh. 1, p. 5; Exh. 2, pp. 3–4; Exh. 6; Exh. 7, pp. 1–3; Tr. 203–4. The Bureau attacks these justifications as not sufficiently supported, as does the ALJ. I.D., Findings, para. 16. Although we agree that Pappas' evaluation of the translator site was less thorough and its reasons for not proposing it less persuasive than its efforts with regard to the other sites, we nevertheless consider these efforts to be adequate to meet the reasonable, good faith efforts test of *WSTE-TV, Inc., supra*. We conclude that Pappas reasonably determined that the Beaucatcher Mountain translator site was inappropriate for its primary transmitter and antenna.

8. Waiver of a rule may also be predicated on the existence of public interest considerations that outweigh the technical requirements of that rule. *WAIT Radio* v. *FCC, supra*. In this instance Pappas proposes to put WHNS back on the air to serve the city of Asheville with a total gain in coverage of 1,208,271 persons.[3] We consider such a dramatic increase, plus the re-emergence of Asheville's second commercial television outlet, to be substantial public interest benefits favoring a slight deviation from the rule. *See Arkansas Educational Television Commission, supra*. In other words, while recognizing that Pappas' proposed transmitter site would move its coverage from technical rule compliance to non-compliance, we cannot lose sight of the reality that the affected area is currently receiving no service at all from a station that has been dark for more

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[3] The present Grade B contour of WHNS provides service to 238,422 persons whereas the Grade B coverage of the proposed facilities would serve an estimated 1,446,693 persons, a gain of 506.78% (Pappas Exh. 1, Supp., p. 2).

than three years. In this sense, then, Pappas is bringing a "new" service to Asheville, a factor of considerable importance. *See WSTE-TV, Inc., supra.*

9. In sum, we are mindful that compliance with the Commission's technical rules is a basic ingredient in an effective program for regulating the electromagnetic spectrum. But rigid adherence to and uncompromising vindication of those rules in all circumstances cannot be justified. *Cf. Son Broadcasting, Inc.*, 52 RR 2d 1017 (Rev. Bd. 1982). Apart from the *de minimis* nature of Pappas' 2.9% coverage shortfall, we have found that Pappas' good faith efforts to locate a suitable alternative site to eliminate shadowing complement the public interest benefits described in paragraph 8, *supra*, and strongly support waiver of §73.685(b), consistent with existing rule interpretations and case precedents. In granting the requested waiver, we conclude that Pappas Telecasting, Incorporated is technically qualified to be a Commission licensee, and that grant of the subject application would serve the public interest, convenience and necessity.[4]

10. ACCORDINGLY, IT IS ORDERED, That the motion for leave to amend, filed July 29, 1982 by Pappas Telecasting, Incorporated IS GRANTED, and

11. IT IS FURTHER ORDERED, That the application of Pappas Telecasting, Incorporated (File No. BPCT-791030KF) for a construction permit to make changes in the facilities of Station WHNS(TV), Asheville, North Carolina, IS GRANTED.

JEROLD L. JACOBS, *Member, Review Board,*
FEDERAL COMMUNICATIONS COMMISSION.

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[4] We reserve the findings in note 4 of the Initial Decision that because a misrepresentation issue was added against Pappas in another proceeding any grant would be subject to resolution of that issue. In fact that issue was added on a comparative basis only and cannot support disqualification of Pappas in either that case or this one. See Memorandum Opinion and Order, FCC 81M-2831, released September 9, 1981.

FCC 82D-51

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of

PAPPAS TELECASTING, INCORPORATED
(WHNS (TV))
Asheville, North Carolina

BC Docket No. 81-494
File No. BPCT-791030KF

For Construction Permits for Changes in Television Facilities

Appearances

John G. Johnson, Jr. and *Peggy Kobacker Shiffrin* on behalf of Pappas Telecasting, Incorporated; and *Joseph Belisle* on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

INTITIAL DECISION OF ADMINISTRATIVE LAW JUDGE WALTER C. MILLER

(Issued: July 13, 1982; Released: July 16, 1982)

Preliminary Statement

1. One applicant remains in this UHF proceeding-Pappas Telecasting, Incorporated (Pappas). Pappas is the licensee of WHNSTV, Asheville, North Carolina.[1] WHNS-TV is presently authorized to operate on Channel 21 at an antenna height above average terrain (HAAT) of 420 feet with a visual effective radiated power (ERP) of 9.21 kW and an aural ERP of 1.48 kW.[2]

2. Pappas proposes to move WHNS' transmitter site about thirty miles south to Slick Mountain. There WHNS would have a visual ERP of 3349.7 kW, an aural ERP of 402 kW and an antenna HAAT of 2509 feet.

3. The proceeding was designated for hearing on August 11, 1981 (46 FR 40919 published August 13, 1981). The issues against Pappas were enlarged on October 22, 1981 (FCC 81M-3353). The following issues remain to be resolved:[34]

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[1] Although the market involved is officially designated the Greenville-Spartanburg-Asheville market, the Commission has assigned Channel 21-the channel involved here-specifically to Asheville, North Carolina. It has specifically assigned four other channels to Greenville and Spartanburg, South Carolina.

[2] WHNS' presently authorized site is on Beaucatcher Mountain inside the city of Asheville. But the station was apparently evicted from that particular site in 1979 and has been off the air since then.

[4] On September 9, 1981, a *misrepresentation* issue was added against Pappas

1. To determine, with respect to Pappas Telecasting Incorporated:
   (a) Whether operation from Pappas' proposed site would cause shadowing over a portion of Asheville in violation of Section 73.685(b) of the Commission's Rules, and if so whether waiver of the Rule would be warranted.
   (b) whether, in light of the evidence adduced pursuant to (a) above, the applicant is qualified.

2. To determine whether granting Pappas' UHF application (BPCT-79103OKF) would constitute a *de facto* reallocation of Channel 21 from Asheville, North Carolina to Greenville and/or Spartanburg, South Carolina, and whether Pappas would comply with 47 USC 307(b) and 47 CFR 73.606.

3. To determine, in light of the evidence adduced pursuant to the foregoing issues, whether Pappas Telecasting, Incorporated's application should be granted. The burden of proceeding and the burden of proof on Issues 1 and 2 are on Pappas Telecasting Incorporated (PTI).

4. The prehearing conference was held on October 14, 1981. Hearing sessions were held on January 26, 1982, and March 23, 1982. The record was closed at the last hearing session. PTI and the Broadcast Bureau each filed Proposed Findings of Fact and Conclusions of Law on June 4, 1982 and their Reply Findings on June 18, 1982.

Issue 1 - The 47 CFR 73.685 Shadowing Issue

5. Pappas filed its modification application on October 30, 1979. Later, in July, 1980, he filed a minor amendment to change his antenna site 2200 feet from Rich Mountain to Slick Mountain. He was well aware at that time that he faced a shadowing question. He indicated ". . . that the intervening terrain will cause 'shadowing' in parts of Asheville and that certain southern areas of the city will receive less than a city-grade signal . . ." See 46 FR 40919 published August 13, 1981, at para. 14.

6. Yet Pappas did nothing to eliminate his 47 CFR 73.685 violation during the eleven months his amended application was on the Processing Line. Meanwhile, on April 13, 1981, the Commission was forced to freeze the filing of translator applications. See *An Inquiry in the Future Role of Low-Power Television Broadcasting and Television Translator in the National Telecommunications System*, FCC 81-173 released April 13, 1981, 49 RR 2d 433.

7. As previously noted (Finding 3 *supra.*) the Commission designated Pappas' application for hearing on August 11, 1981. And

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Telecasting Incorporated in the Omaha, Nebraska proceeding. See FCC 81M-2831. So even if Pappas were to satisfactorily meet Issues 1 and 2, any grant would be subject to the resolution of that character issue.

it specified a shadowing issue. It was then and only then that Pappas went into action.[5] He tendered a translator application on September 14, 1981. Predictably the Commission returned that application on October 15, 1981.[6] It is against this background that PTI's 73.685 evidentiary presentation must be evaluated.

8. 47 CFR 73.685 sets out the requirements a television applicant must meet when he selects a transmitter location and an antenna system. Subsection (b) provides, in pertinent part that:

> "Location of the antenna at a point of high elevation is necessary to reduce to a minimum the shadow effect on propagation due to hills and buildings which may reduce materially the strength of the stations signal. In general, the transmitting antenna of a station should be located at the most central point at the highest elevation available . . . The location should be so chosen that line-of-sight can be obtained over the principal community to be served; in no event should there be a major obstruction in this path . . ."

9. Station WHNS' existing facilities comply with Section 73.685(b). It places a city grade (80 dBu) signal over all portions of Asheville (PTI Ex. 7, p. 7).

10. However, Pappas' proposed operation will not comply with 73.685(b). Because of obstructions between Slick Rock Mountain and Asheville Station WHNS' proposed signal strength would be below city grade over 2.9% of the city. The area of Asheville that won't receive city grade service is in the southwestern part of the city, and has a population of 1,545 people (PTI Ex. 1, pp. 1–2 and PTI Supplement to Ex. 1, p. 2). Thus, we have a situation where an applicant is moving from compliance into non-compliance at the expense of some of the residents of the community of license.[7]

11. Harry Pappas, PTI's President and 99% stockholder, has the opinion that WHNS cannot succeed as an independent UHF station unless it has signal coverage comparative to that of ABC affiliate WLOS-TV, Asheville, North Carolina.[8] However, Pappas has no

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[5] Early on the Presiding Officer expressed his concern about Pappas' moving from a site that complied with 73.685(b) to one that didn't. See FCC 81M-2558 released August 17, 1981 at Footnote 1.

[6] Pappas filed an Application for Review of that action on November 16, 1981. That nondocketed Application for Review is still pending.

[7] As previously noted (Finding 7 *supra.*) PTI filed a belated translator application which it claims would permit it to provide a city grade signal to all of Asheville. Interestingly enough, that translator would have been located on Beaucatcher Mountain—an area that it now claims was unacceptable as a transmitter site location. See Finding 14 *infra*.

[8] WLOS is a VHF station operating on Channel 13. It is the only other TV channel assigned to Asheville, North Carolina. See Footnote 1 *supra*. It has an authorized power of 178 kW-visual, 19.6 kW-aural with an HAAT of 2804 feet. It has its transmitter on Mt. Pisgah and studios in both Asheville, N.C. and Greenville, S.C.

opinion or information on the minimum signal coverage that WHNS would need to survive in the market (Tr. 211–213; 227–228).

12. In the spring of 1979, shortly after he acquired WHNS, Harry Pappas contacted his consulting engineer, Cecil Lynch. He instructed Lynch to search for potential sites and report back.

13. In a series of letters to Pappas, Lynch analyzed several general site locations in the area. Those letters, dated May 29, 1979, June 5, 1979 and July 20, 1980 (Pappas Ex. 2, Attachments) show that there are available general site locations that PTI could use that wouldn't breach 73.685(b).[9]

14. After the case was designated for hearing, on October 2, 1981 (Finding 3 *supra.*), the Bureau served a set of interrogatories on PTI (Br. Bur. Ex. 2). There it, *inter alia*, inquired into PTI's site investigation and evaluation. Pappas responded on November 12, 1981 (Br. Bur. Ex. 3). The following chart summarizes what general site locations Pappas considered and the reason he rejected, and in one instance accepted, the particular location:

CHART

Proposed Site Investigated	Determination/case
Beaucatcher Mountain	Not available; not suitable to be competitive.
Mount Pisgah	Unavailable; controlling party would not permit further commercial use.
Hogback Mountain	Short-spaced
Caeser's Head	Short-spaced
Rich Mountain	Unavailable from DuPont
Slick Rock	Available
Fodderstack Mountain	Unsuitable

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[9] Cecil Lynch has never been to the general site locations he analyzed. He has never even been to the site selected on Slick Rock Mountain (Tr. 362). In fact, contrary to Harry Pappas' sworn testimony (Pappas Ex. 2, p. 5(3), most of the site investigation was conducted using maps (Tr. 166–171).

Horse Shoe/Jeter Mountain	Unsuitable
Standingstone Mountain	Unsuitable

15. After answering the interrogatories (Finding 14 *supra.*), and while preparing for hearing, PTI apparently realized that its waiver position was weak. So in its January 12, 1982 and March 5, 1982 exhibit exchanges it gave new and purportedly additional reasons for having rejected certain sites.[10] More specifically PTI asserted that it had rejected certain otherwise acceptable sites because of blanketing and ghosting and because they would constitute biological hazards.[11] Those belated contentions are rejected. They are singularly unconvincing. They are nothing more than speculations and unsupported arguments designed to try and salvage a lost cause. The Broadcast Bureau properly exposed them as such on the record (PTI Ex. 1, pp. 5–6; PTI Ex. 2, pp. 3–5; Br. Bur. Ex. 1, pp. 14–15; Br. Bur. Ex. 3, pp. 3–4; Br. Bur. Ex. 6, pp. 1–2; Tr. 72–73, 78–81, 84–85, 89, 91, 94–97, 102–103, 347, 349, 351–367, 369, 376–380, 395–396, and 407).

The De Facto Reallocation Issue

16. Under the *de facto* reallocation issue we must determine if PTI is going to use Channel 21 (presently assigned to Asheville, North Carolina) to establish a UHF service for Greenville-Spartanburg, South Carolina. Under *Communications Investment Corp.* v. *FCC*, 641 F.2d 954 (D. C. Cir. 1981) the following facts are relevant to that determination (see paras. 17–22 *infra.*).

17. As presently authorized, Station WHNS' Grade B contour embraces 238,422 people over 1,413.5 square miles. That population is entirely within the State of North Carolina. As proposed WHNS would encompass 1,446,693 people over 12,288 square miles. 523,670 of them live in North Carolina; 852,146 of them in South Carolina; 59,214 of them in Georgia; and 11,633 in Tennessee. All of WHNS' existing Grade B contour would be enveloped by the proposed Grade B. So there would be no "loss" areas and populations.

18. Station WHNS' existing operation places a city grade signal over all portions of Asheville (see Finding 9 *supra.*).[12] But operating

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[10] PTI never did satisfactorily explain why it had failed to include the alleged new reasons in answer to the Bureau's October 2, 1981 interrogatories, or why Lynch's correspondence with Pappas about site selection never mentions blanketing, ghosting, or biological hazards.

[11] For example, Pappas now asserts that blanketing and ghosting problems were taken into account in rejecting a Beaucatcher Mountain site location (PTI Ex. 2, pp. 3–4). But see Footnote 6 *supra.*

[12] During the hearing Harry Pappas asserted that the previous WHNS station licensee told him (at the time he acquired the station) that the station didn't

as proposed it won't (see Finding 10 *supra.*). On the other hand, WHNS' proposed operation would provide a city grade signal to all of Greenville, South Carolina. As noted above, PTI would more than double its coverage of North Carolina, and although its translator application was returned (see Finding 7 *supra.*), it does indicate that PTI didn't intend to deprive even a portion of Asheville of television service.

19. PTI's proposed transmitter and antenna site is closer to Greenville, South Carolina (28.15 miles) than it is to Asheville, North Carolina (29.38 miles). On the other hand the site is farther away from Spartanburg, South Carolina (45.23 miles). This means that the ratio of the distance of the proposed WHNS site from Greenville to the distance from Asheville is 0.958. The corresponding Spartanburg/Asheville ratio is 1.539.

20. Under the 1980 census, Asheville has a population of 53, 281 people; Greenville has 58,242; and Spartanburg has 43,968. So the ratio of the Greenville population to Asheville is 1.093 and the corresponding Spartanburg/Asheville ratio is-1.21. But the Greenville-Spartanburg SMSA had a 1980 population of 568,758 residents while the Asheville SMSA only had 117,761.

21. Neither PTI's proposed site nor any other site within a two mile radius is used by any broadcast facility licensed to either Greenville or Spartanburg; Pappas doesn't propose to share common ownership, staff, facilities or programming with any facility licensed to either Greenville or Spartanburg; Harry Pappas has never tried to purchase a broadcast facility in either Greenville or Spartanburg; he has never tried to get Channel 21 reassigned from Asheville to either Greenville or Spartanburg; and he has never considered locating a WHNS studio in either community.

22. Harry Pappas says that it has always been his intention to restore WHNS and make it a truly competitive television service in Asheville; that it has never been his intention to abandon Asheville; and that his goal is to provide residents of western North Carolina, northwest South Carolina, east Tennessee, and northeast Georgia with a new independent, non-network television service.

Ultimate Findings And Preliminary Conclusions

1. Pappas Telecasting, Incorporated (Pappas or PTI) proposes major changes in its television facilities. It is presently authorized to operate WHNS-TV on Channel 21 at 420 feet (HAAT) with a visual ERP of 9.21 kW and an aural ERP of 1.48 kW.

2. Pappas proposes to move its transmitter site about thirty miles south to Slick Rock Mountain. There it would operate WHNS-

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effectively cover Asheville (Tr. 195). This type of unsupported nonengineering hearsay can't be credited. It is contrary to reliable record evidence. See Finding 9 *supra*.

TV with a visual ERP of 3349.7 kW, an aural ERP of 402 kW, and an antenna HAAT of 2509 feet.

3. PTI is owned by Harry Pappas (PTI's President and 99% stockholder). It faces two basic qualifying issues: a *de facto* reallocation issue; and a 47 CFR 73.685(b) shadowing issue.

The De Facto Reallocation Issue

4. The question that must be answered under the *de facto* reallocation issue is this: Through the substantial changes it proposes, is Pappas trying to use a television channel assigned to Asheville, North Carolina to establish a broadcast service to Greenville and/or Spartanburg, South Carolina, thereby depriving Asheville's residents of a TV facility assigned to them and to which they are entitled?

5. A substantial amount of engineering evidence has been adduced that points toward such a *de facto* reallocation. As proposed Pappas will serve substantially more people in South Carolina (852,146) than in North Carolina (523,670). That isn't the case under his present authorization.

6. Pappas' proposed transmitter site is slightly closer to Greenville, South Carolina (28.15 miles) than Asheville (29.38 miles). From that proposed site Pappas will now bring a city grade signal to all of Greenville but it won't bring such a signal to Asheville. In addition, Pappas will now be serving the Greenville-Spartanburg SMSA (1980 population - 568,758) which is over 41;2 times larger than the Asheville SMSA (117,761).

7. Based on these factors it is likely that Pappas will give in to the temptation to cater to the much larger Greenville-Spartanburg segment of the market at the expense of the community of license. Stated another way, no matter how well intentioned Pappas may be; i.e., that he does not intend to neglect Asheville's needs in favor of Greenville-Spartanburg, it can be argued that the economic realities of life are such that he *must* gravitate toward providing Greenville-Spartanburg much of the attention that Asheville would otherwise get under his existing authorized operation. Money talks.

8. Pappas claims that it has never been his intention to abandon Asheville; that he intends to bring a new regional independent non-network television service to western North Carolina, northwest South Carolina, east Tennessee, and northeast Georgia; but that to restore WHNS and make it a truly competitive service in Asheville he must make the proposed modifications.

9. The following record facts support that claim. As proposed, WHNS would embrace 523,670 people in North Carolina; 852,146 people in South Carolina; 59,214 in Georgia; and 11,633 in Tennessee. Al of WHNS' existing Grade B contour would be enveloped by

the proposed Grade B. So there would be no Grade B "loss" areas and populations.[13]

10. PTI's proposed site isn't within a two-mile radius of a broadcast facility licensed to Greenville or Spartanburg. Pappas won't be sharing common ownership, staff, facilities, or programming with any Greenville or Spartanburg facility; Harry Pappas has never tried to purchase a facility in either Greenville or Spartanburg; and he's never tried to get Channel 21 reassigned from Asheville to Greenville.

11. The *de facto* reallocation question is a close one. But that question will be answered in Pappas' favor. After balancing the evidence that points toward reallocation (Conclusions 5–7 *supra.*) against the contrary evidence (Conclusions 8–10 *supra.*) we will resolve any doubts in Pappas' favor.

12. The adverse coverage figures point toward reallocation. But they equally support Pappas' avowed objective; i.e., to bring a new regional independent non-network television service to western North Carolina, northwest South Carolina, east Tennessee, and northeast Georgia. In addition, and even though his belated translator application was returned, Pappas has shown a genuine and continuing interest in serving all of Asheville with a city grade signal. So it is concluded that Pappas, if granted, wouldn't abandon or even neglect Asheville's legitimate programming and community needs. So Issue 2 will be resolved in his favor.

The 47 CFR 73.685 Shadowing Violation

13. Pappas has failed to sustain his burden of proof under the shadowing issue. So, despite meeting his *de facto* reallocation problem, his modification application must be denied. While we were able to resolve any *de facto* reallocation doubts in Pappas' favor (see Conclusions 11–12 *supra.*) that procedure can't be followed here. The reason is simple. No doubts exist.

14. From the outset - while his application was still being processed - Pappas knew that the substantial facilities changes he proposed would violate 47 CFR 73.685.[14] He openly admitted ". . .that the terrain will cause shadowing in parts of Asheville and that certain southern areas of the city will receive less than a city-grade signal." Yet he made no predesignation efforts to bring his proposal into compliance.

15. The record evidence shows that Station WHNS-TV's *existing*

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[13] In addition, and although Pappas' belated translator application was returned (see Finding 7 and Footnote 7 *supra.*) it does indicate that Pappas doesn't intend to simply abandon Asheville from a coverage standpoint.

[14] Even before PTI amended its site from Rich Mountain to Slick Mountain (see Finding 5 *supra.*) the Commission notified the applicant about the potential for shadowing from Rich Mountain (Tr. 279–281).

authorization would comply with 47 CFR 73.685(b). It will place a city-grade (80 dBu) signal over all portions of Asheville. But Pappas' *proposed* operation won't. There are obstructions between Slick Rock Mountain and Asheville. Because of them WHNS-TV's proposed signal strength would be below city grade over 2.9% of the city. The shadowing violation would occur in the southwestern part of the city and embrace 1,545 people. So we have a situation where an applicant would drift from compliance with the Commission's rules into noncompliance.

16. Nor has Pappas justified waiving his shadowing violation. He hasn't shown that there are no sites available that would permit him to comply with 47 CFR 73.685(b). In fact the evidence shows the converse to be true - that such sites do exist. One can applaud Pappas' private economic goals, but not at the expense of coverage to his city of license. The proposition isn't complicated. Asheville must have better coverage than Pappas is willing to give it. So his application must be denied. See *Central Coast Television*, 14 FCC 2d 985, 989–994 (R. Bd. 1968); *Millard Orick, Jr.*, 51 RR 2d 166, 168 (R. Bd. 1982); and *Garo W. Ray* 36 FCC 1038 (R. Bd. 1964).

Ultimate Conclusion

17. Pappas Telecasting, Incorporated's application can't be granted. As proposed PTI would cause shadowing over a portion of its city of license, Asheville, N.C. That shadowing violates 47 CFR 73.685(b) and PTI hasn't justified waiver of that violation. So PTI isn't technically qualified to be a Commission licensee.

SO, unless an appeal is taken from this Initial Decision or the Commission doesn't reviews it on its own motion, Pappas Telecasting Incorporated's application (BPCT-791030KF) IS DENIED.[15]

WALTER C. MILLER, *Administrative Law Judge*,
FEDERAL COMMUNICATIONS COMMISSION.

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[15] If exceptions aren't filed within 30 days, or the Commission doesn't review the case on its own motion, the Initial Decision will become effective 50 days after its public release. See 47 CFR. 1.276(d).

Character Qualifications, Lack of Candor
Comparative Hearing
Evidence, Presumptions
FM Station, Authorization
Ownership and Management, Integration of
Review by Review Board

Review Board affirmed Initial Decision, granted FM broadcast construction permit, allowed substitution for deceased integrated owner, and gave substantial comparative demerit for a principal's participation in 18 U.S.C. §610 violation in *Star Stations* proceeding and his lack of candor at hearing. Stock subscription, but not option agreement, is recognized for integration credit.
-Peoples Broadcasting Corp.
BC Docket No. 78–243

FCC 83R–5

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
PEOPLES BROADCASTING CORPORATION Indianapolis, Indiana	BC Docket No. 78–243 File No. BPH-9958
RADIO CIRCLE CITY, INCORPORATED Indianapolis, Indiana	BC Docket No. 78–244 File No. BPH-10014
MEDIACOM, INC. Indianapolis, Indiana	BC Docket No. 78–245 File No. BPH-10036
RADIO CORPORATION OF INDIANA Indianapolis, Indiana	BC Docket No. 78–246 File No. BPH-10047
INDIANAPOLIS COMMUNICATIONS CORPORATION Indianapolis, Indiana	BC Docket No. 78–247 File No. BPH-10066
For Construction Permit for a New FM Broadcast Station	

Appearances

William H. Fitz, *James J. Freeman*, and *Michael E. DeBow*, on behalf of Peoples Broadcasting Corporation; *Joel H. Levy*, on behalf of Radio Circle City, Incorporated; *James E. Greeley*, on behalf of Mediacom, Inc.; *Peter Tannenwald* and *Marilyn D. Sonn*, on behalf of Radio Corporation of Indiana; *Morton L. Berfield* and *Lewis I. Cohen*, on behalf of Indianapolis Communications Corporation; and *Lawrence Bernstein* and *Charles W. Kelley*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted: January 17, 1983; Released: January 25, 1983)

BOARD MEMBER BLUMENTHAL FOR THE REVIEW BOARD:

1. This proceeding involves the mutually exclusive applications of Peoples Broadcasting Corporation (Peoples), Radio Circle City, Incorporated (Circle City), Mediacom, Inc. (Mediacom), Radio Corporation of Indiana (RCI), and Indianapolis Communications Corporation (I.C.C.) for authority to construct a new FM broadcast station to operate on Channel 300 at Indianapolis, Indiana. This frequency became available when the Commission refused to renew the license of WIFE-FM because of the extensive misconduct of the licensee, including, *inter alia*, fraudulent billing and political time fraud.[1] By Memorandum Opinion and Order, 68 FCC 2d 1569 (1978), the Commission designated these applications for consolidated hearing on an issue to determine the nature and extent of Robert D. Kiley's involvement in the violations of Commission Rules and policies committed at Stations WIFE and WIFE-FM and the resulting effect on Circle City's basic or comparative qualifications. *Id.* at 1583. Also designated were financial qualifications and failure to report issues against I.C.C. as well as the standard comparative issue to determine which applicant would best serve the public interest. *Id.*

2. In an Initial Decision (I.D.), FCC 82D-39, released May 18, 1982, Administrative Law Judges (ALJs) Byron E. Harrison and Joseph P. Gonzalez granted the Peoples application after concluding that it was comparatively the best applicant based, in part, on their determination that: (a) Circle City warranted a substantial comparative demerit for Kiley's previous involvement in the operation of Station WIFE and a slight diversification demerit; (b) I.C.C. received a slight comparative demerit for failing to report certain litigation

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[1] *See Star Stations of Indiana, Inc.*, 51 FCC 2d 95 (1975), *aff'd without opinion sub nom. Star Broadcasting, Inc.* v. *FCC*, 527 F.2d 853 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 992 (1976). Robert D. Kiley, who was president of Star Stations at the time the licenses were lost and had previously held other managerial positions at WIFE (*I.D.*, para. 12), is now a 61% owner and proposed general manager of Circle City, one of the four applicants here. His conduct at the now-defunct WIFE stations is examined *infra*, paras. 8–22.

against one of its principals, Edward J. Zebrowski, who had been a guarantor of a bank loan to the applicant;[2] and (c) Peoples' quantitative and qualitative integration proposal offered the best practicable service to the public.

3. The proceeding is now before the Review Board on exceptions filed by Circle City, Mediacom, RCI, and I.C.C. Peoples has filed limited exceptions and supports the Initial Decision. Reply briefs have been filed by each of the applicants and the Broadcast Bureau. The Board has reviewed the Initial Decision in light of the exceptions and briefs, the oral argument held October 22, 1982, and our examination of the record. We adopt the findings of fact in the Initial Decision, except as modified herein, and affirm the ALJs' ultimate conclusion that a grant of the Peoples application will best serve the public interest, convenience, and necessity.

4. *Conduct of Robert D. Kiley at WIFE.* Because Robert D. Kiley is the president and a 61.11% shareholder of Circle City and was formerly employed at WIFE in sales management positions and, later, as general manager at a time when egregious and disqualifying misconduct came to light, *Star Stations of Indiana, Inc., supra* note 1 (hereinafter *Star*), the Commission's *Designation Order* in this case specified the following issue (*I.D.*, para. 1):

> 1. To determine the nature and extent of Robert D. Kiley's involvement in the violations of Commission Rules and policies committed at Stations WIFE and WIFE-FM and the effect thereof on the basic or comparative qualifications of Radio Circle City, Inc.

Almost from the outset of the instant proceeding, however, there was some question as to how to relate the Commission's findings of fact and conclusions of law in *Star* to Kiley's pending application. While aware of the Commission's desire to avoid wasteful duplication by retrying issues already resolved in *Star*, the ALJs correctly determined that the findings therein were not *res judicata* as to Kiley's instant application (there being no requisite congruence of issues or parties) nor did the doctrine of collateral estoppel apply (the issue of Kiley's role not being adjudged directly in *Star*). *I.D.*, para. 3.[3] Nonetheless, and in an effort to balance the administrative economy presented by relying on a closed adjudication with Kiley's individual rights, the presiding officials held that "such findings and conclusions would constitute 'rebuttable presumptions with respect to the disqualifying issue' (Tr. 115–17, 321-22)." *I.D.*, para. 6. It was then held that Circle City could "deny, explain or clarify" prior findings. *Id.*

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[2] The financial qualifications issue was resolved favorably to I.C.C. by summary decision and no exception to that ruling has been taken. Therefore, no further treatment of that issue is required. *See I.D.*, para. 73. Also, since I.C.C. has not excepted to the slight comparative demerit for the minor reporting deficiency, no further discussion is warranted. 47 CFR §1.277(a).

[3] In so doing, the ALJs accurately interpreted the Commission's holding in *Red Lion Broadcasting Co., Inc.*, 63 FCC 2d 145 (1977).

5. Circle City takes no exception to the "rebuttable presumption" mechanism; it states that "in most respects, [it] believes the ALJs have been true to their charge and have correctly evaluated the record" (Circle City Br., at 15). And, Circle City itself has made liberal use of testimony and evidence from the *Star* case to support its arguments (*id., passim*). As a matter of procedural due process, we find no fault with the mechanism utilized by the presiding officials. Inasmuch as Circle City bore both the burden of proof and the burden of proceeding with the evidence on its application, 47 U.S.C. §309(e),[4] and in view of the fact that Kiley was a participant in the *Star* proceeding, Circle City was keenly aware that some previous testimony and evidence might be pertinent to Issue No. 1 and of its need to clarify, at least, Kiley's role in the misconduct found at WIFE. Hence, Circle City had every opportunity to meet its burdens by adducing any testimony or other evidence it deemed relevant to the Kiley issue, the same as any other party hereto. For purposes of our review, we deem the "rebuttable presumption" mechanism to mean not much more, from a legal standpoint, than that the *Star* findings and conclusions were to be likened to admissible evidence. Circle City had the option to "deny, explain or clarify" such evidence or face the risk that such evidence could be held against it. From a practical standpoint, then, the ALJs' mechanism placed Circle City in a position not materially distinguishable from any other litigant. Hereinbelow, we assign weight to record evidence based upon intrinsic probative merit and not upon ancestry.

6. The Initial Decision (at para. 7) surveyed Kiley's history in cinquefoil, assaying the following elements:

I. Mr. Kiley's conduct regarding contests at WIFE.

II. Mr. Kiley's knowledge of fraudulent billing practices.

III. Mr. Kiley's conduct in re violations of 18 USC Sec. 610.

IV. Mr. Kiley's conduct regarding WIFE employees Porter and Byers and the Commission investigation.

V. Mr. Kiley's conduct *in re* harassment of Ronald Mercer.

7. In summary, the ALJs found for Kiley on the conduct enumerated as elements I, II, and IV, above, and against him on elements III and V. *I.D.*, Conclusions, paras. 3-17. Viewed across the threshold of the conventional "preponderance of evidence" standard[5] and recalling Circle City's procedural burden of coming forward with a "prima facie and substantial case,"[6] we affirm the

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[4] Circle City accepted this burden. *I.D.*, para. 4.

[5] *Sea Island Broadcasting Corp. of S.C.* v. *FCC*, 627 F.2d 240, 243 (D.C. Cir. 1980).

[6] [W]here a party having the burden of proceeding has come forward with a prima facie and substantial case, he will prevail unless his evidence is discredited or rebutted.

Initial Decision's conclusions with respect to the above-enumerated conduct elements, all except for element V. With respect thereto, and although we find some background evidence of Kiley's interference with Ronald Mercer's later business affairs after Mercer left WIFE, we find insufficient evidence to conclude that Kiley did (or was part of a concerted effort to) harass a potential witness in the *Star* proceeding for the purpose of abusing our processes. Nonetheless, we also find that Kiley seriously lacked candor in certain of his testimony in the instant proceeding and that the Initial Decision was in error in failing to penalize this misconduct. Our reasons are as follows.

8. Element I: Conduct regarding contests at WIFE. The Initial Decision found that two improper contests were held while Kiley was the general manager at WIFE, one in 1966 and one in 1968. There is neither direct nor circumstantial evidence linking Kiley personally to the improprieties, the active misconduct being ascribed to lower-level employees. Although the Commission found in *Star* that the licensee failed to take sufficient precautionary measures to prevent contest abuse (51 FCC 2d at 108), the ALJs here found that Kiley himself had acted responsibly and taken some corrective measures. *I.D.*, Conclusions, paras. 3-5. The Broadcast Bureau does not specifically except to that finding. The responsibility for providing adequate contest safeguards reposes primarily with the licensee. *WMJX, Inc.*, 85 FCC 2d 251 (1981). Nonetheless, even with respect to *Star*, the Commission apparently found that the contest incidents were not necessarily "disqualifying in and of themselves" (51 FCC 2d at 109). In view thereof, we agree that Kiley's managerial position at the time of the improper contests is not to be counted against him in any decisional way.

9. Element II: Knowledge of fraudulent billing practices. A mass of fraudulent billing took place at WIFE, up to and including mid-1965. A substantial portion of the fraud consisted of billing advertisers for spots which were not run. 51 FCC 2d at 96-97. Nobody here disputes the occurrence of the fraudulent conduct; and, in *Star*, the then-general manager, Ronald Mercer, at first signed a 1965 affidavit taking sole personal responsibility for all misconduct at WIFE occurring between 1963 and 1965. *Id.* at 97–98. Although Mercer's affidavit was substantially recanted and the Commission conclusively implicated WIFE's principal owner, Don Burden, in much of the misconduct, Kiley was not blamed for the fraudulent billing in *Star*. During some of the period of the fraudulent billing, Kiley was the local sales manager, having been promoted from salesman in June 1964. Sometime in 1965, however, Kiley contends that he became wary of billing practices at WIFE and that he

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Steadman v. *S.E.C.*, 450 U.S. 91, 101(1981)(citing legislative history of A.P.A. evidentiary standards, reported at H.R. Rep. No.1980, 79th Cong., 2d Sess., 37 (1946)).

subsequently relayed his suspicions to Kevin Sweeney, a consultant hired by Star in 1965. *I.D.*, paras. 25–29.[7] Kiley's revelations, on or about June 4, 1965, were apparently prompted by questions from Sweeney who had discovered at WIFE a Mercer memorandum which instructed on fraudulent billing. *Id.*, para. 27. In his testimony in *Star*, Kiley articulated his basis for suspicion:

> . . . it was either that morning or the day before I had some reason to go back into the traffic department checking on an account and how it ran and the girls in the traffic department at that time told me that they had not run it at that time . . .
>
> I said, 'Why didn't you?'
>
> They said, 'We were told not to.'
>
> I was very much horrified at this at the time and I said, 'Have you been doing this for long?' And they said, 'Well, we have done it a few times.'
>
> I said, 'Who said to do that?'
>
> They said, 'Well, Mr. Mercer told us to do that.'
>
> * * * * *
>
> I will admit I said something to them then, I said, 'You can go to jail for doing that', and I was shook up about it and I didn't know what to do. It was either that afternoon or the next day, it was some time within a 24 or 48 hour period, I don't remember it exactly, that Sweeney walked in with this, and when he confronted me with this question I didn't know what to do.

I.D., para. 31. Kiley suggested that since he was only the local sales manager at the time, he did nothing further about his suspicions because, he claims, the misconduct occurred with respect to regional and/or national accounts which were under Mercer's larger supervisory aegis. *I.D.*, paras. 24–26.[8]

10. In this proceeding, Kiley's testimony differed slightly from his prior understanding of events in that Kiley now remembers that he, not Sweeney, discovered the misconduct and affirmatively brought it to Sweeney's attention. *I.D.*, paras. 31–32. Kiley contends that he is fortified in his more recent perspective because of his recollection of his feelings in June of 1965 when, he says, he

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[7] Although Kiley indicates that he became suspicious of billing practices at WIFE, he could not identify at this hearing any WIFE personnel who acted suspiciously. *I.D.*, para. 25.

[8] Apparently, however, this characterization is not completely accurate. A significant number of billing errors involved local accounts. *I.D.*, para. 40 and Conclusions, para. 7. Circle City does not dispute the fact that many local advertisers were fraudulently billed.

uncovered information that confirmed his suspicions of improper billing. He testified (*I.D.*, para. 33):

> I was very, very concerned, and I was shaken up by the situation, and I believe I have stated that in other testimony at one time or another, because I had just been involved in uncovering what I believe to be something that was, you know, unthinkable and unheard of, and I couldn't believe it, didn't know what to do about it at the time.

11. Kiley asserts that the experience of discovering such a practice at the station left him "horrified" (*I.D.*, para. 31) and he warned WIFE employees: "[y]ou can go to jail for doing that" (*id.*). He also claims that his discovery of the corrupt practices left him "very, very concerned" because it was "unthinkable." *Id.*, para. 33. Notwithstanding this penetrating trauma, and shortly after the issuance of the Commission's designation order and bill of particulars against WIFE on April 26, 1966, Kiley submitted the following affidavit to counsel for Star[9]:

> I have worked for this same frequency under two different owners, Corinthian then, starting with the Fall of 1963, Star Stations. I remained with the Station under new ownership as a salesman, then in July of 1964 I was promoted to Sales Manager and I held this position until December of 1965, at which time I was promoted to General Manager and am now working in this capacity.
>
> From Fall of 1963 to the present time, working as an employee of Star Stations, I have never had the slightest reason to believe that anything deceitful or actions against business ethics was ever being performed, nor intended to be performed, by the owners or any of my superiors at anytime during my tenure as an employee.
>
> A thorough look at my record as a Citizen of Indianapolis and a businessman dealing with Indianapolis businessmen over the years will only point out my honesty and integrity. If at anytime during my employment by Star Stations, I suspect any delineation from straight, honest ethical business relationships, I will and would have terminated my employment immediately. I have always strived, as my record will indicate, to perform my business duties with all honesty and above reproach. [*I.D.*, para. 44.]

12. As to the fraudulent billing element of Issue No. 1, the Initial Decision concludes that there is a "chain of circumstantial evidence" from which it may be reasonably inferred that Kiley was aware, at least, of the fraudulent billing to a greater degree than he admits.

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[9] This affidavit came to light in discovery in the instant proceeding. *Id.*, at n.8.

I.D., Conclusions, para. 7. Albeit, the ALJs declined to make an adverse finding based upon the circumstantial evidence and inference. *Id.* We concur with the ALJs' view that the circumstantial evidence tending to establish Kiley's peripheral connection to WIFE's fraudulent billing is strong. Particularly incriminating is the fact that, although a mainstay of Kiley's defense is that–as local sales manager–he did not follow matters involving national and regional accounts, a substantial amount of the fraudulent billing involved local accounts which were Kiley's bread and butter.[10] Thus, Kiley's first line of defense–an allegedly tight compartmentalization at WIFE–would appear rather porous insofar as the bilking of local accounts. Nevertheless, we will defer on this element to the ALJs who heard the evidence and observed the demeanor of Kiley. *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474 (1951).

13. In their Joint Proposed Findings of Facts and Conclusions of Law, Peoples, Mediacom, RCI, and I.C.C. requested the ALJs to consider Kiley's 1966 affidavit (*id.* at pp. 59, 120) and to conclude that "Mr. Kiley, as a witness in this proceeding, was evasive, lacked candor, and gave testimony . . . unworthy of belief." *Id.* at p. 120. Upon exception to the Board, it is urged that Kiley's lack of candor warrants independent sanction.[11] We agree and find that during the course of trying the question of Kiley's involvement in the fraudulent billing episode, Kiley failed to be forthcoming about the circumstances engendering the affidavit. Our determination in this regard proceeds from the fact that, notwithstanding his claims of traumatic shock at his 1965 "discovery" of prevalent fraudulent billing at WIFE and his immediate recognition that this might be a prisonable offense (*I.D.*, para. 31), Kiley apparently reported his discovery to nobody but Sweeney. And, Kiley asserted, he was reluctant at that time to confront Mercer with his anxieties because Mercer was, in Kiley's *unprompted words*, his "boss" (Tr. 1951), his "superior" (Tr. 2035). Yet, in his June 1966 affidavit, Kiley stated that:

> *From Fall of 1963 to the present time*, working as an employee of Star Stations, I have *never* had the slightest reason to believe that anything deceitful or actions against business ethics was ever being performed, nor intended to be performed, *by the owners or any of my superiors* at *anytime* during my tenure as an employee. [Emphasis added.]

Kiley now claims that his unqualified affidavit was intended to exculpate only the "Omaha home office" (Tr. 1966) and that "[he] did not think the first thought about Mr. Mercer" (*id.*) even though the entire affidavit is plainly keyed to his total experience at Indiana's

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[10] The *I.D.* (at Conclusions, para. 7) found that about 50% billed accounts were local.

[11] *See*, e.g., *Peoples Brief in Support of Initial Decision with Limited Exceptions, at pp. 24–27; I.C.C. Appeal, Exceptions, and Brief, at p. 9.*

WIFE and not to Nebraska or any of Burden's other stations since he never worked anywhere but WIFE (or its predecessor, WISH). Kiley's contention at this hearing that he had blocked Mercer (and WIFE, by implication) out of his mind completely when executing the affidavit is, of course, conclusively belied by the very best evidence–the precise words of the affidavit itself. Not only was Mercer his principal superior at WIFE "[f]rom Fall of 1963" until Mercer took the fall for the misconduct, Kiley–when addressing the Hartke political spot fraud (*see infra*)–contends that he was not a confidante of Don Burden during that period.[12] Hence, Kiley's 1966 affidavit must have been disingenuous for one of two reasons: (1) his affidavit either gave blanket exoneration to unnamed "superiors" whose business practices and ethics Kiley claims to have known next to nothing about; or (2) Kiley knew of the fraudulent billing (which he admits he "discovered" in 1965), but submitted his "good soldier" affidavit to counsel in 1966 anyway.

14. Circle City attempts to explain away the 1966 affidavit by arguing that, by November 1965, the "whole world" knew of Mercer's misconduct and that Kiley had no reason by then to protect Mercer. This is pseudosyllogistic. First, if the "whole world" kenw of WIFE's fraudulent billing in 1965 and of Mercer's role in it, it is curious that, in 1969, Star ran a full-page advertisement in the Indianapolis newspaper informing the world of what it already knew. *I.D.*, para. 32. Second, Circle City's theorem that Kiley had no motive to protect Mercer in 1966 is a transparent straw man argument. Clearly, the stations having just been set for Commission hearing in April 1966 on charges of serious misconduct, Kiley's June 1966 affidavit was intended to protect himself and his employer, the licensee.[13]

15. While it has been held that untruthful matter submitted in connection with a Commission proceeding is actionable even if not submitted directly to the agency, *Publix Television Corp.*, 36 FCC 1215, 1219 (1964), the Kiley affidavit was not submitted to the Commission or exchanged in *Star*. The fact that the affidavit would have been utterly useless in that proceeding is beside the point. For whatever reason, the affidavit was never tendered and, thus, no misrepresentation will be charged even though the affidavit was

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[12] Circle City Br., at p. 12 (referencing Tr. 1486–92); *see also* Tr. 1431–32.

[13] Although counsel for Circle City is not a witness in this case and counsel's pleading are not part of the official record, our view that the affidavit was meant to protect not Mercer (who was not being investigated) but the licensee (which was) is corroborated by the Reply Brief of Circle City in which it is suggested (at p. 9) that the affidavit was executed "at the obvious behest of his employer, Star Stations, and its counsel." We concur. Kiley's willingness, in 1966, to execute an affidavit that does not reflect the 1965 fraudulent billing misconduct admittedly known by Kiley can be read to reinforce Kiley's involvement in the fraudulent billing, at least to the extent of a passing inspiration to stonewall completely.

grossly false. Nor will much be made, at this late date, of the fact that Kiley did essentially nothing after he "discovered" the fraudulent billing in 1965. Both his relative inaction and his protective affidavit, some seventeen years ago, were somewhat understandable given Kiley's duress at the time and less in terms of Kiley's character might be made—in 1983—of Kiley's reaction. However, in the current hearing before us and unlike Mercer in the *Star* case, Kiley did not recant his earlier false affidavit.[14] Further, unlike Don Burden, he does not come before the Commission as a new applicant pleading rehabilitation.[15] Rather, Kiley appeared in the instant proceeding and compounded his 1966 dissimulation about "never hav[ing] the slightest reason to believe" that misconduct occurred at WIFE by the "owners or any of [his] superiors at any time" by advancing a more puerile concoction than those fabrications contained in the stockpiled affidavit. Not only have the courts instructed that the Commission may take action for a conspicuous lack of candor committed "in the face of the court", *RKO General, Inc.* v. *FCC*, 670 F.2d (D.C. Cir. 1981), *cert. denied*, 102 S.Ct. 1974 (1982), the Commission has most recently revoked a license, in part, for lack of candor during a hearing even where no lack of candor issue was separately designated. *William M. Rogers*, FCC 82–481, released November 4, 1982, at para. 26.[16] Here, also, there are no adjudicative facts left to be tried about the circumstances of the affidavit. Kiley testified extensively at hearing as to the affidavit and was cross-examined on his testimony. *See, e.g.*, Tr. 1964–82. All that is left to adjudge is Kiley's credibility in this regard. His motive for failing to fully explicate the circumstances of the affidavit is manifest (*viz.*, a reluctance to here admit even a transitory willingness to assist in a cover-up of WIFE's misconduct) and his current explanations are patently less than forthright. Kiley's easy facility for paltering to protect himself (and others) while under Commission scrutiny and demonstrated incontestably by the 1966 affidavit has not dissipated to this time. Kiley may not have more than "'one bite' at the apple of deceit." *Grenco, supra* note 16, 39 FCC 2d at 737. While we will not go so far as to say that Kiley's fruitless lack of candor as to the obvious circumstances surrounding execution of the affidavit so discredits his testimony on his personal involvement in the fraudulent billing as to reverse the Initial Decision on this element (the stigma in that regard being predominantly inferential), there is no plausible question regarding his prevarication at hearing about the circumstances concerning the affidavit itself. This flagrant lack of candor at the instant hearing will not be excused and the contending parties are correct in their view that failure to sharply condemn that conduct was error.

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[14] *See* 51 FCC 2d at 97–98.

[15] Don Burden, disqualified in *Star*, applied for a new license in 1981. The application was set for oral argument on an issue specified to test Burden's claim of rehabilitation. *L.D.S. Enterprises, Inc.*, 86 FCC 2d 283 (1981).

[16] As the court in *RKO* stated (670 F.2d at 232):

> This duty of candor is basic, and well known. *See, e.g., See Island Broadcasting Corp.*v. *FCC*, 627 F.2d 240, 243 (D.C. Cir.), *cert. denied*, 449 U.S. 834, 101 S.Ct. 105, 66 L.Ed.2d 39 (1980); *Golden Broadcasting Systems, Inc.*, 68 F.C.C.2d at 1101–04. The Commission has said before that 'no specific misrepresentation or lack of candor issues are needed to consider these matters, since the Commission always has authority to deny a license or application where the record reveals such misconduct.' *Radio Carrollton*, 69 F.C.C.2d 1139, 1146 n.20 (1978), *aff'd mem. sub nom. Faulkner Radio, Inc:fo. v. FCC*, No. 79–1749 (D.C. Cir. October 15, 1980), *cert. denied*, 450 U.S. 1041, 101 S.Ct. 1758, 68 L.Ed.2d 238 (1981). *See Grenco, Inc.*, 39 F.C.C. 2d 732, 737 (1973) ("no one is allowed 'one bite' at the apple of deceit").

But see West Coast Media, Inc. v. *FCC*, No. 81–1548 (D.C. Cir. decided Dec. 7, 1982) (suggesting that a finding of intent to deceive requires special advance notice to party).

16. Element III. Conduct in re violation of 18 U.S.C. §610. In *Star*, the Commission found that WIFE was culpable for providing free time to a favored political candidate (former Senator Vance Hartke) in violation of 18 U.S.C. §610. In this proceeding, the ALJs "conced[ed] that many of the details of the Kiley participation in the matter are not clear"[17] but found, nevertheless, that Kiley did have some involvement in the episode.[18] Unlike elements I and II above, we find that the heavy preponderance of evidence supports an adverse finding.

17. Although Kiley continues to deny any knowledge of, or participation in, the corrupt political scheme, the other probative evidence—some in the form of credible testimony and some documentary—affirms Kiley's complicity, at least on some minor scale. That record evidence referenced more fully in the *I.D.*, paras. 45–54 is synopsized as follows: (1) Kiley, who was the local sales manager at the pertinent time, stated that he was certainly aware that spots for Senator Hartke were running on the station. Tr. 1439–40; (2) Mercer, at a time when there was no conceivable motive to distort Kiley's role, testified that he and Kiley split the work on the Hartke account about "50/50" (Jt. Exh. 3, pp. 147–48) and that Burden told Mercer to go to Hartke's office or to send Kiley to find a "patsy" not closely associated with Hartke to sign the phony contract for the political ads (*see* 51 FCC 2d at 100; Jt. Exh. 3, p. 2); (4) Mercer also testified in *Star* that he and Kiley went to the office of the designated "patsy," Edward Lewis, to get the contract signed (Jt. Exh. 3, pp. 147, 252), that he specifically took Kiley with him so that "somebody else [would be] aware of what was going on" (*id.*, p. 147), and that Mercer and Kiley explained the sham to Lewis (*id.*, p. 252);[19] (5) Kiley admits

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[17] *I.D.*, Conclusions, para. 10.

[18] *Id.*, paras. 10, 17.

[19] Although Circle City was aware of Mercer's prior testimony in the *Star* case and that the Commission had credited such in connection with the Hartke matter, and

going to the office of the Hartke operative with Mercer, at least on that occasion. Tr. 1459–61; (6) Kiley's typed name appears as the station representative on the contract for the initial order of Hartke spots (Jt. Exh. 3, p. 174; Tr. 1441–42) and Kiley admits that his name in that context would make him "the representative that would be involved in pulling together the contract." Tr. 2287; (7) Kiley picked up at the advertising agency tapes containing Hartke spots. Tr. 1440, 2254, 2258; (8) Although the Hartke contract—calling for 310 60-second, $19 spots (total $5,890)—was marked "prepaid" (*I.D.*, para. 51), there was in fact no such prepayment and a memorandum from WIFE's auditors, Haskins and Sells, stated that the accountants were told by Kiley in June 1965 that the amount owed "would probably never be collected."[20] However, Kiley testified here that he had not been told at that time that the Hartke account would not be collected (Tr. 1464, 1482, 1484). Nevertheless, and although Kiley was aware that the Hartke balance had been written off as a bad debt in 1965 (Tr. 1486), on April 17, 1970, Kiley wrote to Hartke's office requesting $3,265 for the unpaid balance.[21] When asked to explain the difference between the original $5,890 charges and the amount requested, Kiley stated that he was directed to write the letter as he did by "Mr. Burden and counsel." Tr. 2281–82; (9) Star's bookkeeper at the time, Dorothy Storz, whose credibility on this point is not challenged, testified in *Star* that Don Burden instructed her, in October 1964, to prepare two cash statements—one legitimate and a second without Hartke's projected $5,890 remittance—and

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despite its procedural burden (*see supra*, para.5), it did not call Mercer as a witness in this case or ask him for clarification of his prior testimony. While we do not hold against it Circle City's decision not to call Mercer, we nevertheless have no record basis before us now to discredit Mercer's testimony on this point other than Kiley's bare and selfserving denials. It is not clear whether Edward Lewis was available.

[20] The entire Haskins and Sells memorandum [Jt. Exh. 3, p. 236] reads as follows:

> We are unable to locate the contract or broadcast order supporting the billings comprising the balance at 4/30/65. We discussed the amount with Dorothy Storz and Mr. Kiley, Sales Mgr. Mr. Kiley stated that usually all of the political ads were run on a cash basis and he did not understand what happened on this account. He further stated that the entire balance would probably never be collected. See Analysis 2H for write-off of the entire balance.

Although this memo suggests that Kiley's basis for pessimism about the account's collectability was WIFE's failure to get cash in advance and Kiley originally testified in this proceeding that all that remained after a political campaign was "confetti on the ground" (*I.D.*, para. 52; Tr. 1484), he later testified that it was not always the station's practice in 1964 to ask for cash in advance (Tr. 2295–96), particularly if the station was dealing through a known advertising agency. Tr. 2293. At the time Kiley is noted as having told Haskins and Sells that "the entire balance would probably never be collected," he was well aware that an advertising agency—the Ruben Advertising Agency—was involved. *See, e.g.*, Tr. 2254, 2258.

[21] Letter from Robert D. Kiley to Jacques H. LeRoy, Administrative Assistant to Senator Vance Hartke. Jt. Exh. 3, p. 227; *see also* Tr. 2279.

that when Burden asked that the second statement be destroyed, Kiley sent the statement back to Burden. *I.D.*, para. 52; (10) Intimating, possibly, that he was far estranged from political sales, Kiley denied having received commissions on the political spots contending that he was entitled to salary and a bonus on local sales only (Tr. 1453, 2242–43). Yet, WIFE records show that he received bonuses on local AM and regional sales for the first 5 months of 1964 and that the Hartke political spots were handled as regional sales. *I.D.*, para. 54; *see also* Tr. 2302–07; (11) On three occasions (1969, 1970 and 1971), Kiley denied having anything to do with the sale of political time in 1964 (Jt. Exh. 3, pp. 65, 241; Tr. 2323–24); but this testimony turned out to be untrue. Jt. Exh. 3, pp. 65–66; Tr. 2315.

18. In the main, Kiley's responses to the foregoing evidence are couched in either incomplete memory or absolute ignorance of the sinister circumstances and events surrounding the Hartke scam. In this proceeding, and apart from his own self-serving denials of recollection or knowledge, Kiley produced no witnesses or documentary evidence of any sort to support his squarely contradicted claims of isolation from the Hartke matter. We agree with the ALJs that the preponderant weight of credible evidence amply supports a finding that, at a minimum, Kiley was a junior accomplice in the Hartke affair. Were this a criminal proceeding in which the prosecutor had the burden of proving beyond a reasonable doubt that Kiley was an accessory to a violation of 18 U.S.C. §610, our result might have been different. But that is problematic and, in any event, is neither our function nor our evidentiary standard. *See Steadman* v. *S.E.C.*, 450 U.S. 91 (1981). "[T]he FCC's purpose is not to punish licensees for past wrongs, but to ensure that these 'fiduciaries of a great public resource' [broadcast licensees] will 'satisfy the highest standards of character commensurate with the public trust that is reposed in them.'" *West Coast Media, supra* note 16, slip op. at 10, *citing RKO General, Inc.* v. *FCC*, 670 F.2d 215, 232 (D.C. Cir. 1981).

19. Element IV: Conduct regarding Porter and Byers: In *Star*, the Commission looked into the question of whether the licensee or its employees attempted to interfere with others for the purpose of abusing the Commission's processes and noted that "Kiley refused to permit Commission investigators to question WIFE employees in 1969 until they had been offered and accepted the assistance of *Star's* counsel." 51 FCC 2d at 107. Kiley contends that he was merely following the advice of Star's counsel and that, in any event, he offered the subject employees (Porter and Byers) their option of (1) Star's counsel, (2) their own counsel, or (3) no counsel, and that he didn't hover over them to ensure their choice. *I.D.*, para. 55. Kiley's version is uncontradicted and although the ALJs were suspicious of the "intimidating circumstances" under which the employees were interviewed by Commission investigators (*I.D.*, Conclusions, para.

13), they "concluded that there is no evidence that Kiley intentionally harassed or intimidated." *Id.*, para. 14. We quite agree.

20. Element V. Conduct *in re* harassment of Ronald Mercer. In *Star*, and after first assuming all guilt for misconduct at WIFE, Ronald Mercer ultimately testified adversely to *Star* in 1966 and 1971. Whereas the Commission found in *Star* that Don Burden, who was the controlling stockholder of the licensee, had intimidated and harassed Mercer (*see* 51 FCC 2d at 98-100), Kiley was not personally implicated. After leaving WIFE, Mercer went into the advertising business and there was some testimony that Jack Marsala (WIFE's sales manager in 1969) or Kiley advised one advertiser that there might be a problem placing business at WIFE using Mercer as an advertising agent. *I.D.*, para. 65. Mercer also testified that another client, Gates Toyota, reported that Kiley had made derogatory remarks about Mercer (*id.*, para 67) and that Kiley once required a Mercer client (Simpson-Stygall) to pay its advertising commission directly to Mercer because Kiley had indicated that WIFE wouldn't recognize Mercer. *Id.*, para. 68. Also, Kiley rescinded an invitation to Mercer to a 1969 Christmas party at WIFE. *Id.*, para. 69. Kiley avers that the latter action was Burden's idea and that, based on his personal experience at WIFE, he harbored genuine questions at the time as to Mercer's rectitude. *Id.*, paras. 70-72.

21. The Initial Decision concludes that, based on the incident involving Kiley's refusal to treat Mercer's client (Simpson-Stygall) in the customary manner with respect to advertising agency commissions, "Kiley did make a concerted effort to damage Mercer's business credibility and to harass Mercer. . . ." *I.D.*, Conclusions, para. 16. To be sure, Kiley was not nice to Mercer and Kiley's testimony, particularly about the Simpson-Stygall matter, has a hollow ring.[22] However, the evidence against Kiley is simply too insubstantial to conclude that Kiley attempted to abuse Commission processes. Given Mercer's undisputed part in the chicanery at WIFE, he might have been "our S.O.B." insofar as witnessing against Star, but he was nonetheless not entitled to sterling references from those aware of his past business ethics. We reverse on this element for lack of unambiguous evidence.

22. Conclusions. Under Issue No. 1, the ALJs appear to have given Kiley the benefit of almost every doubt and in reversing the Initial Decision on the question of the harassment of Mercer (element V) we may have gone even further. No doubt there will be those familiar with the serious misconduct at WIFE during the relevant period and Kiley's employment positions at the station while the misconduct was occurring and find that both the Initial

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[22] Although Kiley testified that he may have behaved as he did because he was uncertain that Mercer would pay the Simpson-Stygall bill, the bill had been already paid. *I.D.*, Conclusions, para. 15.

Decision and our disposition here are hopelessly naive. And, indeed, apart from asserting lamblike innocence of the misconduct vibrating all about him at WIFE, Kiley has furnished virtually no evidence to exonerate himself from the pervasive lawbreaking. On the other side, however, and except for the Hartke matter where direct and strong circumstantial evidence as well as Kiley's contradictory testimony tie him directly to the illicit activities, the evidence against Kiley is otherwise insufficient to make confident adverse findings. Having found against Kiley on the Hartke and Mercer matters (elements III and V), the Initial Decision scores Circle City with a "substantial comparative demerit." *I.D.*, Conclusions, para. 17. We have found that substantial extrinsic and circumstantial evidence supports the conclusion that Kiley, at a minimum, played an accessorial role in the Hartke political fraud and that he lacked candor in his testimony at this hearing during the fraudulent billing phase of the instant examination. Because the events subsumed under element III occurred over 16 years ago, we agree that Kiley's conduct need not necessarily be disqualifying here. Kiley was at that time a mere employee of Star and obviously under a great deal of pressure. No evidence shows that he masterminded the Hartke scam; only that he went along, aiding and abetting in a functionary manner. Accordingly, the assessment of a substantial demerit seems a measured response. Inasmuch as the element III demerit is sufficiently substantial to render Circle City, by dispositive distance, the least desirable of the applicants before us, we need not decide the academic question of whether Kiley's lack of candor at the instant hearing was sufficiently egregious as to compel absolute disqualification or whether this failure of complete forthrightness merely heightens its already substantial demerit. *Compare Town and Country Radio, Inc.*, 65 FCC 2d 694, 707 (Rev. Bd. 1977)(substantial comparative demerit for failure to make "full disclosure") *and Fox River Broadcasting, Inc.*, 88 FCC 2d 1132, 1143 (Rev. Bd. 1982)(slight comparative demerit for failure to give thorough answers) *with RKO General, Inc.* v. *FCC*, *supra* (disqualification for conspicuous lack of candor committed "in the face of the court").[23] It is adequate here to review the evidence and exceptions and find that Circle City warrants, at least, a heightened substantial demerit in comparison to the other applicants. It should be licensed only if the other applicants fail.

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[23] As Judge Mikva stated in his dissent in *WADECO, Inc.* v. *FCC*, 628 F.2d 122, 133 (D.C. Cir. 1980)(footnote omitted), disqualification is a "blunderbuss" and:

> There is no doubt that the Commission could have evaluated the character issue in the measured forum of a comparative hearing. Demerits could have been assessed against WADECO for whatever it did wrong or did not do right.

Comparative Issue

23. *Diversification of Control of the Media of Mass Communications.* At the time of hearing, Peoples had the following stockholders: Andrew C. Johnston (10%), Linda C. Jubert (2.5%), and Lafayette Road Corporation (87.5%) which in turn was owned by Joseph Cantor (52%) and his son Daniel Cantor (48%). Peoples Exhs. 1, 3, 7; *I.D.*, para. 85. Joseph Cantor thus had a 45.5% ownership interest in Peoples and Daniel Cantor had a 42.0% interest. *Id.* Neither Johnston nor Jubert had any mass media interests. *I.D.*, para. 106. Lafayette Road, however, owned eight motion picture theatres in the Indianapolis area.[24] Peoples Exh. 1, p. 2; *I.D.*, para. 87, Conclusions, para. 22. The ALJs also found that there were 61 independent movie exhibitors and indoor theatres in Indianapolis and that General Cinema, which owned a chain of 25 indoor screens, was the dominant force in the Indianapolis motion picture theatre market. *I.D.*, para. 87 n.17. The concluded that the Lafayette Road theatre interests attributable to Peoples were *de minimis* and therefore assigned to Peoples no demerit under the diversification criterion. *I.D.*, Conclusions, para. 24.

24. RCI excepts, and citing *La Fiesta Broadcasting Co.*, 6 FCC 2d 65, 75 (Rev. Bd. 1966), argues that at least a moderate comparative diversification demerit should lie against Peoples because movie theatres are a medium of mass communications, Peoples owns eight of them, and all of Peoples' theatres are in the Indianapolis area. RCI Br. at 15–20. Peoples responds, and we agree, that its theatre interests, although technically a medium of mass communications, have no decisional significance in this particular proceeding. Although motion picture and movie theatres are in some sense considered a medium of mass communications by the Commission, *see Williamsport Radio Broadcasting Associates, Inc.*, 22 FCC 2d 1204, 1218 (1957); *Barnes Enterprises, Inc.*, 69 FCC 2d 1957, 1962 (Rev. Bd. 1978), and cases cited therein, we believe as in *Barnes* that the interests here are of "minimal significance" because of the large number of independent theatres and exhibitors in Indianapolis. Moreover, as indicated in *La Fiesta Broadcasting Co.*, *supra*, interests in motion picture theatres do not compare in significance with local broadcast interests, and, as a general matter, we believe that with the passage of time and the declining and now practically non-existent use of newsreels or other informative non-entertainment matter at motion picture theatres, that medium of mass communications is even less significant to the Commission's diversi-

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[24] Lafayette Road also owns a small amount of stock in Schering-Plough, Time Incorporated, Warner Communications, and American Family Corporation, and Daniel Cantor himself owns 200 shares of Schering-Plough. *I.D.*, paras. 104–105, n.20. The ALJs considered these ownership interests to be *de minimis. Id.* No exception to those findings have been taken and we see no reason to disturb them *sua sponte.*

fication concerns as expressed in its *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 394–5 (1965).

25. Circle City was given a slight diversification demerit because Roger Kiley and Phillipa Wyatt, each 5.55% stockholders, also have ownership interests in local advertising agencies. *I.D.*, paras. 128–130, Conclusions, paras. 31–2. Circle City excepts and argues that no demerit should be assessed because these interests are *de minimis*. Circle City Br. at 36–7. Ownership of an advertising agency is not ownership of another medium of mass communications and, although the ALJs cite the Board's decision in *Mid-Florida Television Corp.*, 69 FCC 2d 607, 649 (Rev. Bd. 1978), for the proposition that common ownership of an advertising agency and a broadcast station may be relevant to diversification because of the potential for conflicts of interest, we point out that that decision was subsequently vacated by the Commission. *Mid-Florida Television Corp.*, 87 FCC 2d 203 (1981). Furthermore, the record in this case indicates that ample precautions would have been taken by Circle City to avoid any such conflict. *I.D.*, para. 130. In any event, any slight demerit in this respect would be decisionally insignificant in this proceeding although none of the other applicants were assessed any demerits for diversification, see *I.D.*, Conclusions, paras. 83–4, since Circle City is already out of the running because of the Robert Kiley demerit.[25]

26. *Integration of Ownership and Management.* Peoples was credited with 58% full-time and 42% part-time quantitative integration for its proposal to integrate Joseph Cantor (45.5% ownership interest) as full-time Chief Executive Officer and Chairman of the Finance Committee with ultimate responsibility for financial management of the station, Andrew C. Johnston (10% stockholder) as full-time General Manager and Chairman of the Program Policy and Operations Committees, Linda C. Jubert (2.5% stockholder) as full-time Operations Manager and Chairman of the Personnel Committee, and Daniel Cantor (42% ownership interest) as involved in all facets of station operation on a part-time basis. *I.D.*, paras. 85, 89, 93, 94, 99–103, Conclusions, paras. 25, 27, 28, 84. The ALJs, however, failed to address the effect, if any, of the post-hearing death of Joseph Cantor upon the Peoples integration proposal. The other applicants in their exceptions unanimously point to this failure and urge that Peoples be awarded diminished quantitative integration credit. We agree that the ALJs should have explicitly considered the death question in assessing the integration criterion. Nevertheless and after duly considering the circumstances, we affirm the award of 58% full-time quantitative integration credit to Peoples for the following reasons.

27. First, we shall carefully trace chronologically how the death

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[25] We agree with the ALJs (*id.*) that the other business interests held by the applicants are decisionally inconsequential.

of Joseph Cantor became an issue in this proceeding. On October 13, 1981, Peoples filed a Petition For Leave To Amend reporting Joseph Cantor's death on the preceding September 14th, the election of Daniel Cantor as President and Treasurer of Lafayette Road and his resignation as Vice President, and the transfer of Joseph Cantor's 52% stock interest in Lafayette Road to Daniel Cantor and a local bank as co-executors of his estate. This petition was granted on condition that no comparative upgrading accrue. *Order*, FCC 81M-3484, released November 4, 1981. Then, on November 17, 1981, Peoples filed a Petition to Reopen the Record and a Petition For Leave To Amend reporting the election of Daniel Cantor to replace his deceased father as President, Treasurer, and Chief Executive Officer of Peoples and his simultaneous resignation as Assistant Treasurer. It also reported an increase in General Manager Andrew C. Johnston's interest in Peoples from 10% to 46.5% as a result of the implementation of an option agreement with Lafayette Road (and a concomitant decrease in Lafayette Road's ownership interest in Peoples to 51%),[26] an increase in Daniel Cantor's interest in Peoples by inheritance of Joseph Cantor's 52% interest in Lafayette Road, and a commitment by Daniel Cantor to work full time at the proposed station in his father's stead. The amendment includes: (1) Daniel Cantor's affidavit attached to which are the October 12, 1976 option agreement and a November 9, 1981 purchase and sale agreement between Lafayette Road and Andrew C. Johnston, and (2) a letter from the attorneys for the estate of Joseph Cantor stating that Daniel Cantor is the devisee of Joseph Cantor's ownership interest in Lafayette Road, which in turn owns stock in Peoples. The petitions were granted and the amendment was accepted for reporting purposes only pursuant to Section 1.65 of the Rules. Memorandum Opinion and Order, FCC 82M-0402, released February 8, 1982.[27]

28. Although Peoples would have been entitled to 58% full-time integration credit had Joseph Cantor survived, Peoples' opponents challenge the substition of Daniel Cantor as the Chief Executive Officer of Peoples. Although the Initial Decision did not fully discuss the mechanics of the death-related substitution, it awarded Peoples 58% full-time integration credit as if Joseph Cantor were still alive. We will affirm the award of this magnitude of full-time integration

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[26] The agreement provides that Johnston has the right to purchase "the number of shares of [Peoples] Common Stock owned by [Lafayette Road] at the date of the death of Joseph Cantor which is in excess of the number of shares of [Peoples] Common Stock constituting 51% of the number of outstanding shares."

[27] The Memorandum Opinion and Order (at n.1) points out that a copy of the Joseph Cantor Last Will and Testament and two codicils, as filed for probate on September 22, 1981, was submitted by RCI in its December 1, 1981 erratum to its opposition pleading. The terms of the will provide that Daniel Cantor is the residuary legatee, and the decedent's Lafayette Road interest appears to be part of the residuary estate.

credit because Commission precedent squarely permits an applicant to substitute another stockholder for a deceased stockholder who had been proposed as an integrated owner and to maintain, but not increase, its quantitative integration credit *status quo ante. Rose Broadcasting Company*, 68 FCC 2d 1242, 1248–50 (1978)[28] and cases cited therein; *Muncie Broadcasting Corp.*, 89 FCC 2d 123 (Rev. Bd. 1982).

29. Nevertheless, Peoples' opponents argue that *Rose* only applies to the situation where a principal dies before hearing and the substituted stockholder is consequently subject to the hearing process, including cross-examination. We reject this argument. In *Rose*, the Commission cited with approval, *inter alia*, the Board decision in *Azalea Corp.*, 38 FCC 2d 95 (Rev. Bd. 1972), wherein an applicant was permitted to substitute for an integrated owner who died *after* release of the Initial Decision and while that proceeding was before the Board on exceptions thereto. *See* 68 FCC 2d at 1249. *Rose* simply recognized the "death case" right of substitution in a situation "where the hearing has not yet begun." *Id.* And the Commission more recently permitted the post-hearing substitution for a deceased integrated owner in a case that was before it for review of a Board decision. *Mid-Florida Television Corp.*, 76 FCC 2d 158 (1980). Moreover, in the instant proceeding, the other applicants suffer no prejudice by dint of the substitution because the qualifications of Daniel Cantor as an integrated owner are a matter of record and will require no further hearing since they have already been fully tested at hearing through his written testimony and cross-examination. *See* Peoples Exh. 3 and Tr. 874–906.

30. Nonetheless, the other applicants, citing *Alexander S. Klein, Jr.*, 86 FCC 2d 423, 434 (1981), argue that Joseph Cantor's death is a "core circumstance" that decisionally affects the outcome of the proceeding and, therefore, no substitution should be permitted. We disagree. The "core circumstance" cases cited in *Klein* are concerned

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[28] The Commission itself has summarized its holding in *Rose* as follows:

> In *Rose*, the 51 percent stockholder of Rose Broadcasting Company (Mr. Rosinsky) died and his widow sold the stock to another stockholder (Mr. Jackson) who previously owned 14 percent of the applicant. Before Mr. Rosinsky's death, Rose Broadcasting Company's application indicated that he would be the only stockholder integrated into the applicant's management. Accordingly, when Mr. Jackson acquired Mr. Rosinsky's stock and replaced him in the proposed management structure, the Commission allowed Rose Broadcasting Company to continue to claim 51 percent integration of ownership and management, but would not allow the applicant to claim 65 percent integration, even though the applicant argued that it had always intended for Jackson to participate in the management of its proposed station. The Commission stated that allowing Rose to claim the full 65 percent integration now proposed as to Jackson could prejudice the other parties, 'whose comparative positions were fixed when the time for amendments as of right expired.' 68 FCC 2d at 1249.

Mid-Florida Television Corp., 76 FCC 2d 158, 163 (1980).

with the question of whether there is a need to remand a proceeding for further hearing in order to consider the effect of removal of the decedent and his or her personal impact upon its ultimate outcome. *See Fleming* v. *FCC,* 225 F.2d 523 (D.C. Cir. 1955); *Southland Television Co.* v. *FCC,* 266 F.2d 686 (D.C. Cir. 1959); *Greater Boston Television Corp.* v. *FCC,* 334 F.2d 552 (D.C. Cir. 1964). In this case, no remand is needed because we have fully considered the effect of Joseph Cantor's death in the light of Commission precedent which clearly permits an applicant to substitute for a deceased principal and thereby retain but not increase its pre-existing quantitative integration credit. Based on that evaluation, we conclude that Peoples is entitled to 58% full-time credit. *See Rose Broadcasting, supra*; *Mid-Florida Television, supra.*

31. In its exceptions, Mediacom questions how Daniel Cantor, who was originally proposed as a mere management trainee, can realistically be expected to substitute as Chief Executive Officer for his late father, who had much greater managerial experience, and take over his father's role in charge of financial matters. Mediacom Br., at 15–17. However, the record shows no incapacity on Daniel Cantor's part to perform as proposed. To the contrary, Daniel Cantor has an undergraduate degree in business, has been pursuing an M.B.A. degree program, has been involved in various extracurricular activities (including serving as treasurer of his collegiate Finance Club), and has an FCC Third Class Radiotelephone License with Broadcast Endorsement. Peoples Exh. 3. He therefore has a good background for integration into a meaningful managerial role. In addition, he can rely on Andrew C. Johnston, who is the proposed general manager and an experienced broadcaster, for collaboration where needed. *Id.*; Peoples Exh. 6. Finally, there is no sound basis for questioning Daniel Cantor's commitment, in light of his father's death, to lessen his other activities and devote full time to his duties at the proposed station. Indeed, the Initial Decision found that Daniel Cantor would integrate "a minimum of 30 hours per week to the proposed radio facility and is prepared to spend up to 60–70 hours a week should his responsibilities require it." *I.D.*, para. 93. This commitment was made prior to his father's death and it is obvious that his responsibilities would now require it.[29] Accordingly, the record adequately demonstrates that the Peoples proposal to

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[29] Daniel Cantor, prior to his father's death, testified that "I am prepared to devote as many as 70 hours, 60 variable with need" and was available for cross-examination at hearing on this commitment. Tr. 904–06. None of the parties excepted to the "60–70" hours finding in the Initial Decision; several questioned the qualitiative value of Daniel Cantor's integration. These challenges are rejected as speculative. Peoples' original integration proposal indicated that Daniel Cantor would "participate in the management of the operation" (Peoples Exh. 3), that he would participate on various policy committees (*id.* at 7), and explained what areas on which he would concentrate and what experience he would bring to bear (*id.*).

substitute Daniel Cantor for his father is credible and capable of effectuation and that no further hearing on this score is warranted. *See Webster-Baker Broadcasting Co.*, 88 FCC 2d 944, 950–2 (Rev. Bd. 1982) (where we rejected a broad attack on the credibility of integration proposals and stated that the "[l]ack of past broadcast experience has never been equated with an inability to effectuate an integration proposal").[30] [31]

32. Mediacom was awarded 28.41% full-time and 17.05% part-time integration credit for proposing to integrate 17.05% stockholder James E. Weir as full-time General Manager of the station, 5.68% stockholder Heidi E. Mandich as full-time Community Affairs Director, 5.68% stockholder Robert H. Bernard as full-time Sales Manager, and 17.05% stockholder George P. Sweet concentrating on a part-time basis in the areas of financial management, community relations, and special programming. *I.D.*, paras. 131, 137, 141, 146, 149, Conclusions, paras. 45–51, 84. In its exceptions, Mediacom argues that the ALJs erred in failing to award it 45.45% full-time and 18.18% part-time integration credit to reflect irrevocable voting proxies held by Weir, Mandich, Bernard, and Sweet. The ALJs explicitly refused to credit Mediacom with this higher degree of integration because the Board of Directors, which is controlled by the non-integrated stockholders, can fire the integrated stockholders with or without cause, and had invested about 98% of Mediacom's capital. *I.D.*, Conclusions, paras. 36–44.

33. We affirm the ALJs award of 28.41% full-time and 17.05% part-time integration credit to Mediacom. The "First Amendment to Loan and Option Agreement" filed on June 2, 1977 as an amendment to Mediacom's application states that the voting proxies "shall terminate . . . [s]ix (6) months after the date on which the Corporation is granted a license . . . if by such date the Proxy Holder thereof has not become a full or part time employee of the Corporation" or upon termination of such employment. Thus, while labelled as irrevocable, the proxies are in actuality made contingent

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[31] In its exceptions, Mediacom urges that the Peoples' integration credits for 2.5% owner Linda C. Jubert and 10% owner Andrew C. Johnston be rejected because they are based mostly on stock subscription agreements rather than shares actually issued to them. A stock subscription, unlike an unexercised option, is a binding, mutually enforceable contract by which the subscriber promises to take and pay for shares of stock and the corporation promises to issue and deliver the shares to the subscriber. 18 C.J.S. *Corporations* §283. By contrast, the holder of an option, in order to be entitled to take the stock, must take and pay for the shares within the time limited by the contract. *Id.* at §291. Subscription agreements, because they involve a binding commitment to take shares of stock, are routinely credited for integration purposes. *See, e.g., Radio Gaithersburg*, 72 FCC 2d 835 (ALJ), *aff'd* 72 FCC 2d 820 (Rev. Bd. 1979); *Nuance Corp.*, 85 FCC 2d 412, 417–18 (Rev. Bd. 1981). Mediacom's argument is rejected and Peoples' integration proposal is credited accordingly because Mediacom has failed to show that Peoples will not abide by its specific and unaltered proposal. *See Bradley, Hand, and Triplett*, 89 FCC 2d 657, 662–63 (Rev. Bd. 1982).

upon the proxy holders becoming and remaining employees of the applicant, events which were not entirely under their control and which would not occur in any case until after completion of the hearing process and, therefore, considerably "after the permissible time for comparative changes." *Webster-Baker Broadcasting Co.*, *supra*, 88 FCC 2d at 952. Moreover, as indicated in an application amendment filed November 7, 1978, the proxies were not exercised by the proxy holders until September 15, 1978, which is after this proceeding was designated for hearing. The amendment was accepted by the ALJs subject to Mediacom's binding commitment that the amendment would not enhance its comparative position. *Order*, FCC 78M-1783, released November 24, 1978. Thus, to credit Mediacom with additional voting control based on the proxies would allow it to improve its position based on events occurring after the permissible time for comparative changes. *Webster-Baker, supra*. Moreover, even if it were fully credited, Mediacom's proposal would still place it behind all the other applicants except I.C.C. on integration. *See infra* para. 37.

34. I.C.C. was credited with 9.09% full-time integration for the proposed participation as General Manager of Ray R. Gusky, who though not a current stockholder has an option to purchase 9.09% of the applicant's stock. *I.D.*, paras. 202, 250, Conclusions, paras. 61, 84. No quantitative integration credit was awarded for the participation of stockholders John R. Nichols (14.8%), Richard M. Malad (14.8%), and Mary E. Busch (6.9%), because each proposes to work at the station less than 20 hours per week. *I.D.*, paras. 202, 219, 234, 240, Conclusions, para. 62. This determination was correct. *See Midwest Broadcasting Company*, 70 FCC 2d 1489, 1494–5 (Rev. Bd. 1979). Also, no credit was given for the proposed integration of Herbert Roller (13.1% stockholder) who proposed to devote an overall yearly average of 20 hours per week to the station, based on larger amounts of time devoted during his current employer's off-season of 16 weeks per year, and Ligon W. Drane, Jr. (2.3% stockholder), who proposed to work an average of 25 hours per week concentrated during vacation periods, after school hours, during evenings, and on weekends—because for most of the year they would be working less than 20 hours per week. *I.D.*, paras. 202, 223–4, 245, Conclusions, para. 63. Slight credit was awarded for the participation of stockholders Edward J. Zebrowski (14.8%) and William M. Duchon (13.1%) for proposing to devote 20 hours per week to the station, although the ALJs found that it was not clear whether their duties involve managerial responsibility. *I.D.*, paras. 202, 215, 228, Conclusions, para. 64. Slight credit was also accorded the I.C.C. plan to integrate 20.2% stockholder Leonard E. Walk, initially on a full-time basis during the station's first three months of operation, then gradually less time until he ultimately would devote an average of 20 hours per week to the station, largely maintaining telephonic

contact from his home in Pittsburgh. *I.D.*, paras. 202, 207, Conclusions, para. 66. In its exceptions, I.C.C. argues that its integration proposal was accorded insufficient credit in comparison with the other applicants. We disagree.

35. We believe that even the ALJs' award of 9.09% full-time credit for Gusky was overly generous because he is not yet a stockholder and possesses only an unexercised option to acquire the stock. Option holders, unlike stock subscribers (*see supra* note 31), are not obligated to take and pay for the shares of stock and therefore should not be accorded integration credit for those shares.[32] However, we agree with the remainder of the ALJs' integration analysis as expressed in the *I.D.*, Conclusions, paras. 60–66. Moreover, even were we to credit Gusky's option and award part-time integration credit for Roller, Drane, Zebrowski, Duchon, and Walk, I.C.C. would receive quantitative credit for only 9.09% full-time integration and slightly less than 63.5% part-time integration.[33] As will be discussed below, I.C.C. ranks significantly lower under the integration factor than each of the other applicants. Its alleged qualitative attributes can result in no more than a slight enhancement because these will not be put to use at the proposed station on a substantially full-time basis. *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 396 (1965); *Merrimack Valley Broadcasting, Inc.*, FCC 82R–71, released December 8, 1982 (Rev. Bd.)

36. We have also considered the various other integration exceptions of the applicants. In general, each applicant seeks additional integration credit for itself while disparaging the integration proposals of at least some of the others. No errors of decisional significance have been made in this regard by the ALJs. We recognize the award of integration credit to each applicant as follows: (1) Peoples: 58% full-time quantitative credit (*see* paras. 26–31, *supra*) with qualitative enhancements for Daniel Cantor's local residence (*I.D.*, para. 90), Andrew C. Johnston's local residence and broadcast experience (*id.*, paras. 94–5), and Linda C. Jubert's local residence, civic participation, broadcast experience, and status as a Black female (*id.*, paras. 96–8). (2) Circle City: 61.11% full-time integration credit. Although Circle City seeks enhancement for Robert Kiley's local residence, civic participation, and broadcast experience and residual credit for the less than part-time participation by Black local resident stockholders Sam H. Jones (5.55%), who

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[32] The Commission has recently disallowed integration credit for an unexercised option. *Gilbert Broadcasting Corp.*, FCC 82–415, released September 22, 1982, at n.66. *But see Minshall Broadcasting Co., Inc.*, 15 FCC 2d 931, 937 n.18 (Rev. Bd. 1969).

[33] These five principals currently own together 63.5% of I.C.C.'s stock. Exercise of the Gusky option would result in a *de minimis* decrease of their ownership shares.

has a substantial record of civic participation, and Hallie Bryant (5.55%), the quality of its integration proposal is severely offset by Kiley's misconduct at Stations WIFE-AM/FM.[34] *See* paras. 4–22, *supra*; *I.D.*, paras. 113–120; Circle City Exh. 1. Because of the nature of Kiley's misconduct, we will award residual qualitative enhancement credit only for Jones and Bryant. *See Gainesville Media, Inc.*, 72 FCC 2d 795 (1979);[35] *Webster-Baker Broadcasting Co.*, *supra*, 88 FCC 2d at 952–3. (3) Mediacom: 28.41% full-time and 17.05% part-time participation credit (*see* paras. 32–33, *supra*) with qualitative enhancements for James E. Weir's local residence, civic participation, and broadcast experience (*I.D.*, paras. 133–4, 136), Heidi E. Mandich's local residence, civic participation, broadcast experience, and female status (*id.*, at 138–40), Robert E. Bernard's local residence, civic participation, broadcast experience, and status as a Black man (*id.*, at 142–5), and George P. Sweet's local residence and civic participation (*id.*, at 147–8). (4) RCI: 51% full-time integration credit for the participation as General Manager of stockholder Michael L. Gradison with qualitative enhancements for his local residence, civic participation, and broadcast experience (*id.*, at 167–9, 174–8). In its exceptions, Circle City argues that credit for Gradison should be diminished because he would have little or no involvement with selecting musical records to be played at the proposed station.[36] We disagree because we see no impairment in this regard in Gradison's proposed role as general manager. The Commission's integration policy is directed at making broadcast station owners responsive to changing local needs and problems, which are concerns traditionally met through non-entertainment programming. *See Policy Statement*, *supra*, 1 FCC 2d at 396. Thus, whether or not Gradison is involved in selecting entertainment programming is an insufficient and indeed trivial basis for diminishing credit for his proposal to manage the station. We also reject I.C.C.'s bare allegations that Gradison will not be able to effectuate his proposal because of other financial obligations. Gradison has unequivocally committed himself to work full-time at the station and has made reasonable provisions for his business associates to assume increased responsibility so that he will indeed be able to devote the necessary time to the station. *See I.D.*, paras. 171–72. *See generally Bradley, Hand, and Triplett*, 89 FCC 2d 657 (Rev. Bd. 1982). And I.C.C.'s belated attempt to challenge Gradison's candor is wholly speculative and lacking in factual support. Also, we reject RCI's contention that it should receive substantial credit for the proposed commitment of its two Black stockholders, Rozelle Boyd and Fay Williams, who together own 14.5% in RCI, to attend Board of Directors meetings and that it should therefore receive more qualitative enhancement for minority participation than Peoples. RCI is entitled to only a slight merit for its minority ownership that will be integrated less than part time at the proposed station, and that merit cannot be equated to that which is due Peoples since the latter applicant will have a Black female participating in a full-time managerial position. *See Midwest Broadcasting Co., supra*, 70 FCC 2d at 1496 n.14. (5) I.C.C.: slight credit for proposing to integrate Zebrowski, Duchon, and Walk—a total of 48.1% of its stock ownership—on at most a part-time basis. *See* paras. 34–35, *supra*. Qualitative enhancements are recognized for Zebrowski's local residence and civic participation, Duchon's local residence, and Walk's broadcast experience. *I.D.*, paras. 203–08, 212–14, 226. Although I.C.C. claims additional credit for Walk's past broadcast record, such credit will not be awarded because (1) I.C.C. was required to make a threshold showing prior to presenting evidence but instead submitted its showing as part of its direct case, *see Gilbert Group, Inc.*, 49 RR 2d 1081 (1981), and (2) on the merits, the evidence indicates that while Walk's other stations were in some respects above average, at three of those stations the Commission noted specific deficiencies in station performance and operation. *See I.D.*, paras. 254–5. Thus, on balance, we believe Walk's record was within the range of average performance and entitled to no special weight. *Policy Statement*, *supra*, 1 FCC 2d at 398; *cf. Terre Haute Broadcasting Corp.*, 25 FCC 2d 348 (Rev. Bd. 1970). Moreover, even if I.C.C. were entitled, at most, to a slight preference in this regard, its importance would pale when weighed alongside its last place finish under the integration criterion, which is an important factor in determining "best practicable service." *See Hassayampa Broadcasting*, FCC 82R-70, released November 29, 1982, at para. 7.

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[34] Circle City's claim for part-time integration credit for stockholders Doninger, Young, Wyatt, Roger Kiley, and Lipman (Br. at 39) was rejected by the ALJs as a variance from its application. *See* Tr. 246–55. Circle City's exception to this ruling is denied. Since these proposals are for far less than 20 hours per week participation, the applicant would not be entitled in any event to more than a slight residual credit, which would be decisionally insignificant in this case. *See Midwest Broadcasting Co.*, *supra*.

[35] In *Gainesville*, the Commission, following its decision in *East St. Louis Broadcasting Co.*, 29 FCC 2d 170 (1971), held that the qualitative enhancement otherwise due a principal's full-time integration proposal was eroded owing to the principal's deficient past broadcast record.

[36] Circle City Br., at pp. 39–43.

37. In summary, Circle City has a marginal quantitative advantage over Peoples in full-time integration (61.11% vs. 58%), but this insignificant quantitative edge is completely offset because, whereas Peoples' proposal is qualitatively enhanced by virtue of the attributes of its integrated principals, Circle City is qualitatively degraded because of the past broadcast record of its president, proposed general manager and 61% owner, Robert D. Kiley. *See generally East St. Louis Broadcasting Co., supra* note 35, 29 FCC 2d at 172–74 (applicant awarded quantitative integration credit for proposed

participation as general manager of principal with unusually poor past broadcast record but the quality of the integration proposal was "markedly lessened" by such participation); *Gainesville Media, Inc., supra,* 72 FCC 2d at 796–97 (one-third owner credited for quantitative integration purposes but his misconduct "erodes most of the qualitative benefit otherwise due" for his participation). Peoples merits a slight integration preference over RCI because it has more full-time integration credit (58% to 51%) and is better enhanced qualitatively because it proposes to have a Black female owner integrated full time as the Operations Manager of the station. While RCI receives residual credit for the less than part-time participation of Boyd and Williams, *see* para. 36, *supra,* this credit is substantially less than that earned by Peoples' Mrs. Jubert who will be integrated on a full-time basis in a management position. Mediacom is in fourth place, largely because it is credited with only 28.41% full-time integration while the others will have a majority of their stock ownership integrated full time into management. I.C.C. is quantitatively last.[37] Like Peoples and RCI, Mediacom and I.C.C. are qualitatively enhanced. However, their comparative standings are largely unaffected by their enhancements because of the clear differences in the quantitative integration awarded them in comparison with the other applicants and with each other. *See New Continental Broadcasting Co.,* 88 FCC 2d 830, 850 (Rev. Bd. 1981); *Merrimack Valley Broading, Inc.,* FCC 82R-71, released December 8, 1982.[38]

38. *Final Comparative Evaluation.* There are no significant differences among the applicants under the diversification criterion. Peoples and Circle City have slight integration preferences over RCI, a moderate preference over Mediacom, and a substantial preference over I.C.C. *See Merrimack Valley Broadcasting, Inc., supra,* paras. 16–17. In addition, Circle City has been given a substantial comparative demerit for the lack of character of its prime principal, Robert D. Kiley. I.C.C. has been given a slight demerit for its reporting violation and all applicants are accorded a slight preference for

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[37] I.C.C. would still be solidly last even if it were to be credited with 9.09% full-time and 63.5% part-time integration credit. *See* paras. 34 and 35, *supra.*

[38] Circle City also excepts to the ALJs' refusal to disqualify Dean Burch and the law firm of Pierson, Ball and Dowd from representing Peoples in this proceeding. The Board will deny this exception. As noted *supra,* paras. 4–5 (findings in *Star* not *res judicata* as to Kiley nor does collateral estoppel apply), the instant case involves neither the same parties nor the same issues as *Star* which was decided well after Burch left the Commission. Further, as Peoples has urged strenuously throughout these proceedings, the entire *Star* proceeding did not focus upon Kiley. That is the very purpose of Issue No. 1 in this case and Peoples cannot have it both ways. Circle City's summary exception does not point with particularity to any error in the ALJs' detailed eight-page opinion and we fully agree with the analysis and conclusions expressed therein. *See Memorandum Opinion and Order,* FCC 82M-0526, released February 22, 1982.

proposing auxiliary power. Therefore, the final comparative ranking is: 1. Peoples, 2. RCI, 3. Mediacom, 4. I.C.C., and 5. Circle City. Peoples, the applicant with the best integration proposal and with no offsetting demerits, is the preferred applicant. While Peoples' advantage over second-ranked RCI is not great, it is sufficient on a relative comparative basis to conclude that Peoples will provide the best practicable service to the public and that a grant of its application will best serve the public interest, convenience and necessity.

39. ACCORDINGLY, IT IS ORDERED, That the Petition for Leave to Reply filed on July 20, 1982 by Peoples Broadcasting Corporation IS DENIED, and the accompanying Reply pleading IS DISMISSED; and

40. IT IS FURTHER ORDERED, That the Petitions for Leave to Amend filed on June 29 and November 16, 1982 by Peoples Broadcasting Corporation ARE GRANTED, and the amendments ARE ACCEPTED for Section 1.65 reporting purposes only and subject to the condition that no comparative upgrading will be recognized as a result thereof; and

41. IT IS FURTHER ORDERED, That the Petition for Leave to Amend filed on August 23, 1982 by Peoples Broadcasting Corporation IS GRANTED, and the amendment IS ACCEPTED; and

42. IT IS FURTHER ORDERED, That the Petitions for Leave to Amend filed September 21 and November 19, 1982 by Radio Circle City, Inc. ARE GRANTED, and the amendments ARE ACCEPTED; and

43. IT IS FURTHER ORDERED, That the Petition for Leave to Amend filed on December 1, 1982 by Mediacom, Inc. IS GRANTED, and the amendment IS ACCEPTED; and

44. IT IS FURTHER ORDERED, That the Petition for Leave to Amend filed on November 10, 1982 by Radio Corporation of Indiana IS GRANTED, and the amendment IS ACCEPTED; and

45. IT IS FURTHER ORDERED, That the Petitions for Leave to Amend filed on May 25, July 28 and September 10, 1982 by Indianapolis Communications Corporation ARE GRANTED, and the amendments ARE ACCEPTED; and

46. IT IS FURTHER ORDERED, That the application of Peoples Broadcasting Corporation (File No. BPH-9958) IS GRANTED; and that the applications of Radio Circle City, Incorporated (File No. BPH-10014), Mediacom, Inc. (File No. BPH-10036), Radio Corporation of Indiana (File No. BPH-10047), and Indianapolis Communications Corporation (File No. BPH-10066) ARE DENIED.

NORMAN B. BLUMENTHAL, *Member, Review Board,*
FEDERAL COMMUNICATIONS COMMISSION.

FCC 82D-39

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
PEOPLES BROADCASTING CORPORATION Indianapolis, Indiana	BC Docket No. 78–243 File No. BPH-9958
RADIO CIRCLE CITY, INCORPORATED Indianapolis, Indiana	BC Docket No. 78–244 File No. BPH-10014
MEDIACOM, INC. Indianapolis, Indiana	BC Docket No. 78–245 File No. BPH-10036
RADIO CORPORATION OF INDIANA Indianapolis, Indiana	BC Docket No. 78–246 File No. BPH-10047
INDIANAPOLIS COMMUNICATIONS CORPORATION Indianapolis, Indiana	BC Docket No. 78-247 File No. BPH-10066
For Construction Permit for New FM Broadcast Station (107.9 MHz; Channel No. 300)	

Appearances

Donald Mulvihill, Charles Leeper, James J. Freeman and *William H. Fitz* on behalf of Peoples Broadcasting Corporation;[1] *Joel H. Levy* and *Roy Russo* on behalf of Radio Circle City, Incorporated; *James E. Greeley*, Lawrence J. Bernard and *Peter Gutmann* on behalf of Mediacom, Inc.; *Peter Tannenwald* and *Gene A. Bechtel* on behalf of Radio Corporation of Indiana; *Morton L. Berfield* on behalf of Indianapolis Communications Corporation and *Jerald N. Fritz*, *Joseph Chachkin*, *Matthew Leibowitz* and *Lawrence Bernstein* on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

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[1] The appearance of Dean Burch was entered on behalf of Peoples Broadcasting Corporation after the record was closed.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE BYRON E. HARRISON AND ADMINISTRATIVE LAW JUDGE JOSEPH P. GONZALEZ

(Issued: May 10, 1982; Released: May 18, 1982)

1. By *Memorandum Opinion and Order*, FCC 78–551, released August 16, 1978, the Commission designated the captioned applications for hearing on the following issues:

1. To determine the nature and extent of Robert D. Kiley's involvement in the violations of Commission Rules and policies committed at Stations WIFE and WIFE-FM and the effect thereof on the basic or comparative qualifications of Radio Circle City, Inc.
2. To determine with respect to the litigation in which Edward J. Zebrowski is involved:
   - (a) The effect thereof on the ability of Indianapolis Communications Corporation to secure its proposed $500,000 bank loan; and
   - (b) The effect of the applicant's failure to report the litigation on its basic or comparative qualifications to be a licensee.
3. To determine which of the proposals would, on a comparative basis, best serve the public interest.
4. To determine, in light of the evidence adduced pursuant to the above issues, which of the applications should be granted.[2]

2. The five captioned applicants each seek a mutually-exclusive authorization for an FM broadcast station to operate on Channel 300 in place of the deleted facilities of broadcast station WIFE-FM, Indianapolis, Indiana.

3. Prehearing conferences were held on October 5, 1978 and December 15, 1978. Evidentiary hearings were held on March 5, 1979 through March 21, 1979, April 19, 1979 and May 10 through May 18, 1979. Supplementary hearings were held on June 1, 1979, June 28, 1979 and July 31, 1979. Proposed findings of fact and conclusions of law were submitted in accordance with the following schedule:

> *Phase 1* (to be filed by October 25, 1979) - Each applicant will file affirmative findings of fact on its own comparative case.

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[2] The Commission directed, in para. 42 of the Designation Order, *supra*, that any grant to Mediacom, Inc., is without prejudice to any action which the Commission might deem appropriate as a result of the final disposition of pending antitrust litigation involving its principals.

Radio Circle City, Incorporated and Indianapolis Communications Corporation to file proposed findings and proposed conclusions on special issues addressed to them.

Phase 2 (to be filed by December 3, 1979) - Proposed findings adverse to other applicants on comparative issues and proposed conclusions on all issues. The Broadcast Bureau will file its proposed findings and conclusions on non-comparative qualifying issues.

Phase 3 (to be filed by January 7, 1980) - Reply findings and conclusions on all issues.

Issue 1, paragraph 20 of the Designation Order provides that facts adduced in the record of *Star Stations of Indiana, Inc.*, 51 FCC 2d 95 (1975), pertaining to the actions of Robert D. Kiley, may not be controverted or relitigated. On October 30, 1978, the Broadcast Bureau (Bureau) filed a motion to certify questions pertaining to Issue 1 to the Commission. By *Memorandum Opinion and Order*, FCC 78M-1852, released December 11, 1978, the Bureau's motion was denied. However, the Presiding Judge established guidelines similar to those instituted in *Deep South Radio, Inc.*, FCC 77M-1996, released November 25, 1977. Specifically it was ordered that the relevant parts of the hearing records in *Star Stations of Indiana, Inc.* decisions of 1975 *supra* and 1969 (19 FCC 2d 991) are neither *res judicata* nor create collateral estopple as to Kiley. Accordingly, it was directed that materials concerning Kiley in the 1969 and 1975 *Star Station* proceedings be offered as an exhibit in this case and that Kiley be given an opportunity to explain, clarify or contradict them.

Findings of Fact

Issue 1

Background of the Issue

4. In the Commission's *Memorandum Opinion and Order* (FCC 78–551) designating the captioned applications for hearing, a potentially disqualifying issue was directed at Radio Circle City, Incorporated (Circle City) regarding the conduct of its President and majority stockholder, Robert D. Kiley. The issue is as follows:

> "To determine the nature and extent of Robert D. Kiley's involvement in the violations of Commission Rules and policies committed at Stations WIFE and WIFE-FM and the effect thereof on the basic or comparative qualifications of Radio Circle City, Inc."

Circle City has assumed the burden of going forward as well as the burden of proof on this issue (Opposition of Circle City to Requests for Specification of Issues at p. 4; Tr. 307–08, 330). This issue was added because of the past employment history of Robert D. Kiley, who was employed at Stations WIFE and WIFE-FM from 1963 when the stations were first acquired by a company controlled by Don W. Burden, until 1976 when the renewals of the licenses for these facilities were finally denied. During this 13-year period, there were two full adjudicatory hearings on the renewal applications for WIFE and WIFE-FM. The first such hearing, in Docket 16612, was conducted in 1966 and resulted in 1969 in the issuance of six-month renewals of the licenses for the stations. *Star Stations of Indiana, Inc.*, 19 FCC 2d 991 (1969). In 1971, a second round of hearings (Docket 19122) was held on the WIFE renewal applications then pending (in a consolidated proceeding that included applications for renewal of licenses of three other stations controlled by Don W. Burden). This hearing resulted in 1976 in the implementation of orders finally denying operating authority to the licensee (51 FCC 2d 95 (1975)).

5. The Designation Order in the captioned proceeding provided that the record in the prior adjudicatory proceedings concerning the violations at WIFE should be used in this proceeding to avoid unnecessary and wasteful duplication of procedures. Kiley was not a party in the two previous WIFE proceedings and he was not separately represented by counsel in those proceedings. His role was that of a witness. The Presiding Judge established specific guidelines for the utilization of the prior records assembled in Dockets 16612 and 19122. In setting such guidelines, consideration was given to the fact that the Review Board's decision in *Red Lion Broadcasting Co., Inc.*, 42 FCC 2d 1116 (Rev. Bd. 1973) as cited in the Designation Order was specifically reversed in 1977 (*Red Lion Broadcasting Co., Inc.*, 63 FCC 2d 145 (1977)).[3]

6. In view of the Commission's 1977 action in the *Red Lion* case, it was held that the findings of fact and conclusions of law as set forth in the prior WIFE hearing records as to which Circle City was given specific notice, such findings and conclusions would constitute "rebuttable presumptions with respect to the disqualifying issue" (Tr. 115–17, 321–22). It was ruled that Circle City may deny, explain or clarify the prior hearing records through testimony and documentary evidence and such evidence as was adduced in this proceeding would be weighed by the Court and a determination made as to whether the presumption from the prior records had been successfully rebutted (Tr. 336–37, 339–40).

7. Pursuant to these guidelines, all parties applicant, except Circle City, became a group known as the Joint Applicants and excerpted from the prior hearing records specific documents, pages and lines of testimony and findings and conclusions of the Judge and

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[3] See *Memorandum Opinion and Order*, released December 11, 1978 at para. 9–10.

the Commission (Joint Exhibits Vols. 1–4, which will be cited as J (Vol. No.) and page no.). This Joint Exhibit served to place Circle City on notice as to the specific findings and conclusions of the prior records which the Joint Applicants would rely under the disqualifying issue (Issue 1). Circle City's evidence was then to rebut these presumptions through the testimony of Robert D. Kiley and related exhibit material.[4] Such evidence and exhibit material in five specific areas dealt with in the prior hearing are as follows:

I Mr. Kiley's conduct regarding contests at WIFE.
II Mr. Kiley's knowledge of fraudulent billing practices.
III Mr. Kiley's conduct in re violation of 18 USC Sec. 610.
IV Mr. Kiley's conduct regarding WIFE employees Porter and Byers and the Commission investigation.
V Mr. Kiley's conduct in re harassment of Ronald Mercer.

Kiley's Prior Broadcast Experience

8. Before proceeding to an examination of the facts on Items I-IV above, some background information on Mr. Kiley and his relationship to WIFE is required. Mr. Kiley is the President, Director and 61.11% shareholder of Circle City (Circle City Exhibit 1, p. 1; Tr. 1353). He is the proposed full-time General Manager (Circle City Exhibit 1, p. 9). Kiley was born in Indianapolis, Indiana on September 30, 1935 and he has resided there all his life (Circle City Exhibit 2, p. 1). Kiley's broadcast career commenced in 1959 when he became an account executive for Stations WISH-AM-FM at Indianapolis. WISH was owned by Corinthian Broadcasting (Circle City Exhibit 2, p. 1; Tr. 1412). Kiley was the top salesman at WISH (Tr. 1745).

9. In 1963, WISH-AM-FM were sold to Star Stations of Indiana, Inc. (Circle City Exhibit 2, p. 1). Star Stations of Indiana, Inc. was a wholly-owned subsidiary of Star Stations, Inc. (Joint Exhibit 4, p. 6). Star Stations through other subsidiaries was also the licensee of Stations KISN, Vancouver, Washington and KOIL and KOIL-FM, Omaha, Nebraska. The Chairman, President and majority stockholder of Star Stations, Inc., was Don W. Burden. Burden eventually owned 92.3% of Star Stations, Inc. (Joint Exhibit 1, p. 4; Joint Exhibit 4, p. 6).

10. In January, 1964, Burden changed the call letters of the WISH stations to WIFE-AM-FM (Tr. 1357). Kiley was retained as a salesman (Tr. 1353). WIFE's Sales Manager at that time was Bud Donegan. Mr. Donegan was transferred to Station KOIL as the General Manager and Kiley replaced him as the Local Sales Manager of WIFE in June, 1964 (Joint Exhibit 3, p. 64; Tr. 2185–86).

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[4] Circle City asserts the position in both the development of the findings and conclusions that some of the presumptions from the prior hearing records do not exist as there was no support for the conclusion previously made.

11. Star Stations of Indiana was never granted a regular 3-year renewal for the WIFE licenses (Joint Exhibit 1, p. 4). The Commission had approved the assignment from Corinthian to Star Stations on November 7, 1973. Renewal applications filed several months later were granted for short terms of one year because WIFE had used a partial survey of audience ratings in a misleading fashion in order to improve sales. *Star Stations of Indiana, Inc.*, 3 RR 2d 745 (1964) (Joint Exhibit 1, p. 4). These short-term renewals expired on August 1, 1965 (Joint Exhibit 4, p. 1). The WIFE renewal applications were filed on May 17, 1965. These renewal of license applications were designated for hearing in Docket 16612. The issues involved whether during the short-term license period, fraudulent contests were held and false invoices and affidavits of performance were rendered to advertisers (Joint Exhibit 4, p. 2; Joint Exhibit 1, p. 4). The Initial Decision denied renewal of both WIFE licenses (19 FCC 2d 1012, issued December 15, 1967). However, the Commission granted the renewal applications for six months (*Star Stations of Indiana, Inc.*, 19 FCC 2d 991 (1969)). When renewal applications were next filed, they were again designated for hearing on numerous issues, including fairness doctrine, slanting news, free broadcast time to a political candidate, deceptive contests, attempts to harass and intimidate present and former employees. This time the Commission denied the renewals of all five Star Stations. *Star Stations of Indiana, Inc.*, 51 FCC 2d 95 (1975).[5]

12. Following Court appeals of the Commission decision, Star Stations ceased broadcast operations in June, 1976 (official notice taken of FCC records). During this period, 1963 to 1976, of constant turmoil involving Burden and Star Stations, Kiley rose to the top management of the WIFE stations. He was made General Manager of the station, replacing Ronald Mercer, in approximately December, 1965 (Joint Exhibit 3, pp. 64–65, 96; Joint Exhibit 4, p. 667; Tr. 1522). Kiley was appointed Vice President of Star Stations of Indiana, Inc. in 1968 (Joint Exhibit 3, p. 64). Kiley became President in January, 1973 and he also acquired a stock interest at that time agreeing to purchase 1,500 shares of Star Station stock, a 1.15% share. The purchase price was $18,000 (Tr. 1678–79). Kiley paid $12,000 down and was paying $200 per month on the balance. By the time of the Commission's 1975 decision, Kiley had paid approximately $14–15,000 of the $18,000 total (Tr. 1679). In late 1976 or early 1977, Kiley sold his stock back to Star Stations, Inc. for exactly the amount he had paid in (Tr. 1680, 2456, 2460).

13. In addition to the Kiley Star Station stock, Kiley also had other business associations with Don Burden. In approximately 1973, Burden, Kiley and WIFE Sales Manager, Jack Marsella (who replaced Kiley in that position) formed BKM Enterprises. BKM was

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[5] The Initial Decision, which was reversed, appears at 51 FCC 2d 114.

a partnership which held a single parcel of real estate, namely the building occupied by the WIFE stations and other tenants. Burden held 75% ownership and initially Kiley and Marsella owned 20% and 5%, respectively. Later, Kiley who paid $9,000 for his 20% interest, purchased Marsella's 5% share for $1,600 (Tr. 1682, 2461–62). Kiley states the partnership was dissolved in late 1977 or early 1978 when the land and building were sold (Tr. 2462). Kiley stated he made no profit from this enterprise either (Tr. 1682–83, 2463).

14. In approximately 1965, Kiley, Burden and others became engaged in an enterprise called "Bridal Fair" (Tr. 1680). Bridal Fair, according to Kiley, is a marketing concept whereby radio and TV stations inform brides-to-be of services available to new homemakers (Tr. 1680, 2469–70). Bridal Fair is still in existence and it has been sold to 85–110 markets each year since its founding (Tr. 2471). Burden originally held approximately 35–40% of Bridal Fair. Kiley states that Burden sold his interest in 1977 or 1978. Others, all associated with Star Stations, Inc. who had an ownership interest in Bridal Fair include Steve Shepard, Don Tawzer, Tom Devaney, Steve Brown and Kevin Sweeney (Tr. 1681). Kiley states that these were the only business relationships with Burden and, at this time, he has no business connection with Burden (Tr. 1684, 2464).

15. From the fall of 1976 to the present, Kiley has been employed as an associate of an Indianapolis advertising agency of Kiley, Miller and Bain, Inc. Kiley has two relatives who also work at this firm - his uncle is chairman and his brother Roger (also a Circle City principal) is an officer (Tr. 2472). Kiley's Conduct Regarding Contests at WIFE

16. There were two contests conducted by WIFE during the period that Kiley was the General Manager which were the subject of Commission scrutiny in Docket 19122. The Commission found that these contests had not been properly conducted (51 FCC 2d 107–08).

17. The "13 Car Sweepstakes" contest was run in the spring of 1966 (Tr. 2107). The winner was to be selected in a drawing and could select one car from 13 cars that were advertised (Tr. 1660). Star's home office in Omaha prepared the continuity for the three Star stations that were used for promotion of the contest. Kiley believed the promotional materials lacked clarity in that people could be led to believe that 13 cars were to be awarded to 13 different winners rather than one winner who had a choice of one of 13 cars. Kiley felt that while there was nothing wrong with the copy, it could be improved (Tr. 1660–61, 2133, 2105, 2123–24, 2133–34). Kiley testified in this proceeding that he had from the very start of the "13 Car Sweepstakes" directed the WIFE staff to run a tag indicating that just one car would be given away (Tr. 1662, 2106, 2134). On cross-examination, Kiley was shown his previous testimony in Docket 19122 at Tr. 2908, indicating that the contest had been aired a day or two before the tag lines were run (Tr. 2138–39). The contest drawing took place at a shopping center on Saturday, April 30, 1966 (Tr.

2130). Kiley was not present at the drawing, but, Kiley was advised that three to five persons at the drawing inquired as to when the other twelve cars would be given away (Tr. 1663, 2120–21). Kiley said he was aware of no complaints concerning the contest (Tr. 2121). Subsequently, the Better Business Bureau inquired as to the name of the contest winner, and, according to Kiley, he asked the Bureau if there were any complaints and the Bureau said there were none (Tr. 2109). Kiley said he examined the contest file at Better Business and satisfied himself that there were no complaints (Tr. 1663). It appears that complaints had been filed with the Omaha Better Business Bureau about Station KOIL's running of the same contest. The Omaha Better Business Bureau then wrote to the Indianapolis office asking about the WIFE contest (Tr. 1662).

18. On June 21, 1966, Kiley wrote a memo for the file at WIFE concerning his visit to the Better Business Bureau and ascertained "that there were virtually no complaints" (Tr. 1664). Kiley in this proceeding was asked what he meant by "virtually no complaints" testified that he meant that there were no complaints at all (Tr. 2120). Kiley admits that his recall of the events in 1966 was better in 1966 than in 1979 (Tr. 2131).

19. The second contest was called the "Mystery Melody Contest" and it ran at Station WIFE in 1968, offering $1,000 to the person who could correctly identify a song played on WIFE. The contestants were picked, pursuant to station instruction, by random selection of names, from a telephone directory. Under no circumstances were friends, relatives or neighbors to be called (Circle City Exhibit 20). The operator on duty at WIFE was to pick a name from a container holding the slips of paper with the names randomly chosen for the day, call the person and ask if they wished to participate. If the answer was yes, the disc jockey would play the "mystery melody" over the air, and, if the contestant knew the title, he would receive $1,000. What actually happened here is quite a different story. It appears that a woman called the station operator and said she and her husband knew the name of the mystery melody and asked to be called back later and given a chance to win. The WIFE operator did as suggested and the couple were named winners of the contest. The next morning, while Kiley's secretary was preparing the paperwork for the awarding of the prize, it was discovered that the winner's name was not on the master list of names from the telephone book that had been selected at random. The operator admitted what had taken place and Kiley dismissed her and ordered announcements to be run at once stating that the prize had been erroneously awarded and that the station would donate $2,000 to charity. The donation was made to a charity selected by the Mayor and the Commission was notified, with supporting affidavits, detailing steps that would be taken to avoid a similar situation in the future. Kiley also held

meetings with employees and distributed a memo explaining Section 509 of the Communications Act[6] (Tr. 1651–59, 2095-2105).

20. The telephone operator who rigged the "Mystery Melody Contest" was 18 year old Cathy Eileen Young who had worked for WIFE some three months at the time of the contest and was earning a salary of $70 per week (Circle City Exhibit 20, p. 6). According to Ms. Young, her duties included "operation of the FM machines, clerical work, answering the telephone and running the contests when required to do so. . . ." (Circle City Exhibit 20, p. 6). The instructions furnished to Ms. Young did speak of selection of participants "at random" but there were no specific written instructions as to a random sample procedure (Circle City Exhibit 20, p. 6). Kiley could recall no additional instructions as to the random sample procedure (Tr. 2098–2100). Since Ms. Young did not add the name of the "winning" party to the master list, it was this omission which led to the discovery that the contest had been rigged (Circle City Exhibit 20, pp. 4, 6, 13).

21. In Docket 19122, the Commission found the rigged contest to be the result of inadequate safeguards and regarded the matter as misconduct of decisional significance. At this time, Mr. Kiley was the General Manager and the facts and previous conclusions relative to this contest are again re-examined relative to Kiley's role as the General Manager.

Fraudulent Billing Practices

22. It is Mr. Kiley's position that he was not aware of the fraudulent billing practices that occurred at WIFE (Tr. 1427). Mr. Kiley also ascribed to himself a role of being instrumental in uncovering and bringing an end to these practices (Tr. 1439–42).

23. The Commission's 1969 decision in Star Stations found in part that the stations had engaged in fraudulent billing practices. This finding of the Commission was based on facts set forth in Judge Donahue's Initial Decision issued in 1967, 19 FCC 2d 1012. That Initial Decision concluded that the then General Manager Ronald Mercer and Don Burden "were in pari delicto insofar as misconduct at WIFE is concerned" (19 FCC 2d at 1033; Joint Exhibit 4, p. 25). The Commission adopted the conclusion of the Initial Decision on fraudulent billing, except it disagreed that Don Burden had actual knowledge of the fraudulent billing (19 FCC 2d at 994; Joint Exhibit 4, p. 3). Judge Donahue's decision lists the WIFE personnel responsible for the practice of sending the incorrect bills and the fact that all these employees took their instruction from either Ron Mercer, the General Manager, or Dorothy Storz, the Chief Bookkeeper of the

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[6] This deals with Prohibited Practices in Case of Contests of Intellectual Knowledge, Intellectual Skill or Chance.

parent company. The Initial Decision does not mention Mr. Kiley by name as being involved with this practice.

24. Kiley was the Local Sales Manager for WIFE in June, 1965 (Tr. 1416). As such, Kiley supervised a sales staff of approximately five persons on the AM and two on the FM (Tr. 1749). Kiley states that throughout his time as Local Sales Manager, he had no involvement with regional or national accounts. These accounts, according to Kiley, were handled either by Dick Shireman, Star Station's Vice President and National Sales Manager or by WIFE General Manager, Ronald Mercer (Tr. 1421, 1770–71). An exception was when Mercer was out of town. In early June, 1965, Mercer was on vacation (Tr. 1440, 1475).

25. According to Kiley, from perhaps early in 1965 he had sensed that something untoward was happening on Mercer's sales accounts (Tr. 1920). He could not put his finger on the problem (Tr. 1476). Upon inquiry of the Traffic Department concerning one of Mercer's accounts, he was refused the information he sought (Tr. 1475). The Traffic Department personnel would tell Kiley that since it was Mercer's account, Kiley was not entitled to intervene (Tr. 1767, 2221). Kiley stated he found such behavior suspicious. However, since he had no authority over regional or national accounts, he let the matter drop (Tr. 1768). During Kiley's testimony in the instant proceeding, he was read a list of names represented to the WIFE Traffic Department personnel for the period in question, but Kiley could not identify the personnel who acted suspiciously (Tr. 1920–23).

26. These events cause Kiley to be suspicious of Mercer (Tr. 1475). Kiley knew what fraudulent billing was and that it was illegal (Tr. 2221). Kiley also testified that at times he, while in Mercer's office, would ask Mercer if everything was alright. According to Kiley, Mercer would reply "Yes, don't worry about it. Don't worry about it." (Joint Exhibit 4, p. 683; Tr. 1951). Kiley states he did not know for certain that anything was wrong (Tr. 2035). He did not pursue it because Mercer was his boss (Tr. 1475, 1951, 2035). Perhaps, Kiley conceded, he did not really want to know what was going on (Tr. 1767).

27. The events of June, 1965 are both a matter of dispute and decisional significance in this proceeding. Judge Donahue had found, and the Commission affirmed, that the following facts occurred (19 FCC 2d at 103–131; 19 FCC 2d at 991; Joint Exhibit 4, pp. 1, 22–23). On April 1, 1965, Kevin Sweeney was retained by Star Stations as an advertising consultant to all Star Stations. He made his visit to WIFE in early June, 1965 and while there, Sweeney saw a Mercer station memorandum that directed advertisers' commercials be aired one way and billed another. The next morning,[7] Sweeney asked Mrs. Dorothy Storz, Star Stations' Bookkeeper, to make a check of

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[7] This may not have been the next morning. See paragraph 29 *infra*.

discrepancies between station logs and the terms of sale. Checking the month of April, 1965, Mrs. Storz counted about a dozen such discrepancies. Sweeney then called Don Burden to report what he considered an extremely serious matter. Star Stations' communications counsel was notified and he confirmed the matter was serious. On June 15, telegrams were sent to 28 advertisers which stated that inaccurate bills had been submitted for announcements run during April, 1965. Advertisers were offered a choice of refunds or make-good announcements. Calls and follow-up letters were later transmitted covering the months of May and June, 1965. Advertisers received a total of $3,306.48 in restitution. The actual duration of the fraudulent billing at WIFE was substantially greater than admitted by Star Stations. The amount of money fraudulently obtained from WIFE advertisers was "far greater than the damage WIFE acknowledged in its evidence" (Joint Exhibit 4, pp. 22–23).

28. Kevin Sweeney testified in the 1966 Star Stations proceeding in Docket 16612. He stated that after he saw the Mercer memorandum in the Traffic Department, he went to Kiley, then Local Sales Manager (Joint Exhibit 4, p. 509). Sweeney told Kiley what he had seen and asked Kiley if the practice described in the memo was widespread. Sweeney testified to Kiley's reaction as follows:

> Well, I don't know if I can describe accurately what happened. [Kiley's] raised eyebrows and hunched shoulders gave me to understand, and by what I extracted from him, that this was not the solitary case, that there were other advertisers but at the same time he said he was not sure how many because this was outside of his bailiwick. (Joint Exhibit 4, p. 509)

According to Sweeney, Kiley identified Mercer as the person responsible for such practices (Joint Exhibit 4, p. 510).

29. Sweeney testified that the topic of the Mercer memo was reopened with Kiley either that evening or the following night during dinner (Joint Exhibit 4, p. 511). Kiley told Sweeney that he was certain there were many such examples of inaccurate billing. Sweeney described Kiley as reluctant to tell tales but "he was very concerned about these things and he felt somebody should know and he was glad that I had brought the matter up and now he felt relieved about it" (Joint Exhibit 4, p. 512). Sweeney testified that it was after this meeting that he asked Mrs. Storz to make her check (Joint Exhibit 4, pp. 512–14).

30. Confirming Sweeney's account, Mrs. Storz testified in the 1966 proceeding that improper billing practices had been occurring at WIFE since possibly January, 1964. She stated that there had been complaints (Joint Exhibit 4, pp. 779, 781–82).

31. Kiley, in his 1966 testimony, corroborated Sweeney's version of the discovery of the fraudulent billing practices. Kiley related that on or about June 4, 1965, Sweeney walked into his office with "a

memo of sorts" and asked if there was fraudulent billing at WIFE. "I was very surprised at what he said", Kiley testified. "Although I did want to talk about it to him later, I did not feel like I wanted to go into it right then in my office" (Joint Exhibit 4, p. 678). Kiley gave the following explanation for his surprise:

> . . .it was either that morning or the day before I had some reason to go back into the traffic department checking on an account and how it ran and the girls in the traffic department at that time told me that they had not run it at that time. . .
>
> I said, "Why didn't you?"
>
> They said, "We were told not to."
>
> I was very much horrified at this at the time and I said, "Have you been doing this for long?" And they said, "Well, we have done it a few times."
>
> I said, "Who said to do that?"
>
> They said, "Well, Mr. Mercer told us to do that."
>
> ....
>
> I will admit I said something to them then, I said, "You can go to jail for doing that", and I was shook up about it and I didn't know what to do. It was either that afternoon or the next day, it was some time within a 24 or 48 hour period, I don't remember it exactly, that Sweeney walked in with this, and when he confronted me with this question I didn't know what to do. (Joint Exhibit 4, pp. 678–79)

Kiley testified that Sweeney's discovery solved Kiley's own dilemma as he did not wish to approach either Mercer or Burden (Joint Exhibit 4, p. 680). "So", Kiley continued, "I told him what the girls told me. . .I went on record with him then that if this was not squared away or they were not going to do something about it, they could count me out" (Joint Exhibit 4, p. 681).

32. In 1969, Burden ran a full-page advertisement in the Indianapolis newspapers. It was headlined "WIFE tells it like it really was". Signed by Burden, the advertisement told Star Stations' side of the "hypoed ratings", "fraudulent contests" and "bilked advertisers". These were the accusations which had, up to this point, resulted in two short-term renewal for WIFE (Joint Exhibit 1, p. 143). Under the "bilked advertisers" category, the advertisement stated:

> In June of 1965, while the then station manager was on vacation, a broadcast consultant, Kevin Sweeney, discovered the possibility of erroneous affidavits having been sent out to certain advertisers. An internal audit disclosed the then station manager had ordered erroneous affidavits to be sent to approximately 27 clients. When I became aware of this, I authorized telegrams to be sent immediately offering full restitution. As time went by, other discrepancies were discovered and total

> restitution was made in all instances to everyone's complete satisfaction. Total restitution came to $6,100.
>
> We discovered the situation and corrected it, (the same as any other responsible business would do), a full four months before the matter was ever brought to the attention of the Federal Communications Commission. As a result of the station manager's blatant disregard of company practices and policies, he was summarily dismissed.

Kiley in the instant proceeding has for the first time disputed Sweeney's version of the events of June, 1965. Kiley now claims that it was he who actually discovered the improper billing practices. In Kiley's December, 1978 deposition, he gave the following statement after reviewing Sweeney's 1966 testimony:

> I don't have any information necessarily that would conflict substantially other than what I –and maybe it's because of my ego–but when I read this, I feel like the feeling is here, or maybe I'm reading something into it that shouldn't be there, that it was more Sweeney telling me when, actually, as I remember, it was me telling Sweeney. You know, I mean, for my part, it was me finding out these things and telling Kevin that night. . . . (Tr. 1783–84).

During the instant hearing, Kiley stated categorically that: "I remember bringing it up [to Sweeney] because I was quite disturbed about" (Tr. 1441). Shortly thereafter, Kiley stated: "I know what happened and it was me finding it and relating it to him at the time" (Tr. 1446). Throughout the initial cross-examination of Kiley, he continued to assert that he was the one who brought the improper billing to Sweeney's attention (Tr. 1769, 1779). Kiley also now disputes the Burden version of events as set out in the "WIFE tells it like it really was" newspaper advertisement. He now relates that he had complained to Burden about the ad prior to it being run, but was told that "the ad had been gone over with counsel, and pulled together, and don't fight it, put it in. You know. And so I put it in the newspaper" (Tr. 1671). However, as the cross-examination of Kiley continued on this point, Kiley's recall became less certain. Asked, at Tr. 2028, whether it was he or Sweeney who first discovered the billing discrepancies, Kiley stated:

> A. I feel like I did.
>
> Q. You mentioned it first to Sweeney.
>
> A. I say I feel like I did. To the best of my recollection.

Subsequently, Kiley admitted that he had no positive recall of the meeting with Sweeney (Tr. 2161).

33. Kiley also disputed Sweeney's testimony in the prior WIFE proceeding that Kiley, "by raised eyebrows and hunched shoulders gave me to understand. . .that this was not the solitary case [of fraudulent billing]. . ." Kiley testified it just doesn't seem like that is a depiction of how I look when I am mad, and that is why I

disagree with it" (Tr. 2162, 2200–2201). Kiley described his feelings in June, 1965 as follows:

> I was very, very concerned, and I was shaken up by the situation, and I believe I have stated that in other testimony at one time or another, because I had just been involved in uncovering what I believe to be something that was, you know, unthinkable and unheard of, and I couldn't believe it, didn't know what to do about it at the time. (Tr. 2162)

Kiley recognizes that Sweeney had no reason to shade his testimony in his own favor (Tr. 2201).

34. Mercer was not dismissed as the WIFE General Manager until November or December of 1965 for the fraudulent billing practices discovered in June, 1965 (Tr. 2223). Mercer was replaced as General Manager by Kiley and Mercer was offered another position with Star Stations, that of West Coast Sales Director, which position Mercer declined (Tr. 2225).

35. It is the position of Kiley and Circle City that there has never been any direct testimony or other evidence in this proceeding or earlier ones, linking Kiley to fraudulent billing practices at WIFE. Thus, the conclusion must turn on the degree of care Kiley should have taken for a person in his position at that time, or, as suggested by Circle City that otherwise this could lead to a guilt by association conclusion. Thus, it is appropriate to include some facts relative to what duties and records were available to Kiley during the critical time period.

36. Kiley states in the instant proceeding that he was a WIFE salesman during the period in question and he had no contact with either the stations accounting or billing departments (Tr. 1417). Kiley did have contact with WIFE's Traffic Department, since this department made up the station logs on the basis of broadcast sales orders (Tr. 1417–18). Kiley said his contacts with Burden were few and far between (Tr. 1358). But such contacts with Burden did increase when he became Local Sales Manager. However, such contacts always related to sales (Tr. 1422–23, 1491). It will be recalled that Kiley was a salesman for the WISH when Burden took over the station in November, 1963 and Kiley's sales experience goes back to 1959 (Tr. 1410–14). Kiley continued as a salesman at the station (now WIFE) and became its number one salesman (Tr. 1423, 1745, 1957) and was appointed the Local Sales Manager in June, 1964 (Tr. 1415–17). Local sales grew under Kiley's direction and WIFE became the number one station in the market (Tr. 1745–47). Mr. Kiley is familiar with broadcast industry concepts and with sales orders, advertising contracts and other station documents which he was shown during the course of his testimony (Tr. 1425–27, 1742–45, 1754–56).

37. Kiley states that he had virtually no dealings with or knowledge of the billing and accounting office at WIFE. He described

this office as a "closed shop" (Tr. 1417–18, 1424–25, 1438–39). Kiley talked of the "compartmentalization" of the staff at WIFE (Tr. 2164). However, Kiley did acknowledge that as a salesman and the Local Sales Manager, he did have some dealings with the billing accounting staff (Tr. 1417–18, 1763–66, 1931–32) which comports with the testimony of such staff personnel in the prior hearing proceeding (Joint Exhibit 4, pp. 329–330). Kiley was confronted with his testimony in the prior proceeding to the effect that while he was in the accounting office or the traffic office, he observed practices which led him to believe that perhaps his superior, Mr. Mercer, did not understand traffic or accounting procedures, and, that he had raised these matters with Mr. Mercer (Tr. 1765–66, 2036, Joint Exhibit 4, pp. 681–82). In this instant hearing, Mr. Kiley denied that he had offered to assist Mr. Mercer in an understanding of the accounting procedures at WIFE (Tr. 1765–69).

38. Judge Donahue's findings in the previous case reflect that the WIFE fraudulent billing which took place in the accounting office was not done in secret. Kiley's superior, Mercer, had sent various memos to bookkeeping employees instructing them in this regard (Joint Exhibit 5, pp. 7–25). There existed in the billing and accounting office a written statement of procedures relative to the means of effecting the fraudulent billing which was included in the billing clerk's notebook and was similar in nature to other written operating instructions employed by other offices at the station (Joint Exhibit 4 and Circle City Exhibits 29–30; Tr. 1937, 1940, 2056). Kiley's supervisor, Mercer, had prepared this statement (Joint Exhibit 4, pp. 310–11).

39. Sweeney had testified in the former proceeding that "WIFE was a closed society" and that Mercer was vague and uncooperative when asked about his office procedures and Sweeney learned that other WIFE employees felt this way about Mercer (Joint Exhibit 4, pp. 530, 532). Kiley states that he received no complaints from clients, salesmen or other WIFE employees and given the large volume of spots carried by WIFE, it was not possible to keep track of where these spots were being run by simply listening to the radio. Further, since most of the spot sales were largely limited to BTA (best time available) or ROS (run of schedule) it was impossible to detect any wrongdoing by listening to the radio and noting when spots ran.

40. Kiley stated that most of the inaccurately billed accounts, concerning which telegrams were sent out in June, 1965, were not within his area of responsibility (Tr. 1791). Kiley testified that Mercer signed the national broadcast orders, Mercer or Shireman signed regional orders and Kiley signed local sales orders (Tr. 1772). Also, Mercer could also sign local sales orders (Tr. 1812). Kiley indicated that if the salesman on a particular account was a local salesman, he worked for Kiley (Tr. 1810). It was shown that about

half of the inaccurately billed accounts were handled in whole or part by Kiley's own sales staff (Tr. 1792–94, 1815). Numerous instances of inaccurate billing were shown to have occurred with respect to these local accounts (Joint Exhibits 6–10). For example, concerning the Credit Advisers account, during the period October, 1964 through March, 1965, over 100 inconsistencies were shown to exist between client invoices and WIFE program logs (Joint Exhibit 6).

41. It is Kiley's position that as Sales Manager, he did not personally handle accounts (Tr. 1917). When a broadcast order was submitted for his approval he would only check to see if the rate was proper and whether a credit check was required (Tr. 1754). If everything appeared correct, the orders were typed and distributed to other departments - traffic, production and accounting (Tr. 1755). A copy of the order would go to the client and the salesman got a copy for his file (Tr. 1426). Traffic would then schedule the announcement, production would handle the process of having the right commercial in the studio at the right time, billing would take the time the commercial ran off the log and bill the client accordingly (Tr. 1427). According to Kiley, the WIFE Local Sales Manager never received copies of affidavits sent to clients showing times the spots were allegedly run (Tr. 2022).

42. Kiley testified in the instant proceeding that as Local Sales Manager, he had a "feel" of what time remained available for sale on the stations (Tr. 1760). This knowledge was limited to local accounts and Kiley denies any knowledge of national or regional accounts (Tr. 1762, 1770, 1778). Kiley stated his contacts with the Traffic Department related only to the sales load and if the load was light, he would have no contact at all with Traffic. During peak sales periods, Traffic might inform Kiley as to what time periods were sold out and what time was still available (Tr. 1759, 1963). Kiley would then pass this information along to his salesmen at the next sales meeting which meetings were held twice daily, Monday through Friday and once on Saturday (Tr. 1774, 1948). The Sales Department, according to Kiley, received no copies of the daily logs (Tr. 1776).

43. Kiley continued to insist in this proceeding that he, as Local Sales Manager, was unable to detect any wrongdoing on local sales accounts until June, 1965 since it would have been very difficult at stations so highly structured and departmentalized (Tr. 2164). He further states that he had no reason prior to June, 1965 to suspect any illegality (Tr. 2164–65).

44. One final matter needs to be considered in connection with Kiley's knowledge of the fraudulent billing that took place at WIFE and that is Kiley's affidavit of June, 1966. Shortly after the WIFE renewals were designated for hearing in April, 1966, Kiley gave his employer an affidavit which in this proceeding he admits was false,

with some explanation. The affidavit was an attempt by Kiley to clear his superiors of any wrongdoing (Joint Exhibit 11; Tr. 2039).[8] The affidavit states:

> I have worked for this same frequency under two different owners, Corinthian then, starting with the Fall of 1963, Star Stations. I remained with the Station under new ownership as a salesman, then in July of 1964 I was promoted to Sales Manager and I held this position until December of 1965, at which time I was promoted to General Manager and am now working in this capacity.
>
> From Fall of 1963 to the present time, working as an employee of Star Stations, I have never had the slightest reason to believe that anything deceitful or actions against business ethics was ever being performed, nor intended to be performed, by the owners or any of my superiors at anytime during my tenure as an employee.
>
> A thorough look at my record as a Citizen of Indianapolis and a businessman dealing with Indianapolis businessman over the years will only point out my honesty and integrity. If at anytime during my employment by Star Stations, I suspect any delineation from straight, honest ethical business relationships, I will and would have terminated my employment immediately.
>
> I have always strived, as my record will indicate, to perform my business duties with all honesty and above reproach. Kiley acknowledged the affidavit was false as it related to Mr. Mercer, and stated that at the time the affidavit was prepared, he had blocked Mr. Mercer out of his mind (Tr. 1965–66, see also Tr. 1965–83). *bc2 Kiley's Conduct in re Violation of 18 USC 610[9]

45. This issue involves WIFE's furnishing of free time to Senator Vance Hartke during his 1964 re-election campaign in violation of the Fairness Doctrine and 18 USC Section 610. The Commission found in the Docket 19122 proceeding that Burden had provided substantial numbers of radio ads on WIFE to Hartke's campaign committee, without any expectation of being paid, and that the news staff at the station had been instructed to provide regular favorable mentions of the Senator during newscasts.

46. It can be concluded at the outset of consideration of this issue that there are no facts in the prior hearing record to support Kiley's involvement with the Commission's finding on newscasts supportive of the Senator. Accordingly, only that part of the Commission's Docket 19122 proceeding will be considered as relates to the Fairness Doctrine and 18 USC Section 610. Evidence in this area derives from

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[8] The affidavit first came to light during the discovery phase of the instant proceeding.

[9] This will sometimes be referred to as the Hartke matter.

two principal sources: Mr. Kiley and Mr. Mercer. Kiley was the Sales Manager of the station during the time free advertising was provided to the Senator and Mercer was the General Manager at the time. Kiley testified extensively in the Docket 19122 proceeding and the instant proceeding about the Hartke matter (Joint Exhibit 3, pp. 64–129) and in the instant proceeding (Tr. 1484–1565). Mr. Mercer testified only in the prior proceeding and portions of his testimony are incorporated in the present record by Joint Exhibit 3, pp. 130–149.

47. The status of Mr. Mercer's testimony in the Docket 19122 proceeding must first be considered. The Presiding Judge in Docket 19122 found that Mr. Mercer, having given a false affidavit, and having shown animosity toward WIFE management, could not be credited absent firm corroboration. *Star Stations of Indiana,* 51FCC 2d at 97–98 (1975). The Commission found that this strict view was in error and stated that Mercer's evidence must be viewed in the light of relevant facts and circumstances in the record. 51 FCC 2d at 100. The Commission further overruled the Judge's rejection of the Mercer evidence by granting the Bureau's Exception Nos. 11–17 to the Initial Decision which were directed to the Mercer credibility. 51 FCC 2d at 110. The Commission's evaluation of the Mercer testimony is as follows:

> "In light of Mercer's recanted affidavit and his hostile demeanor toward Burden, his testimony has not been accepted uncritically. However, Mercer's testimony comports with other circumstantial and testimonial evidence of record, as set forth above and Burden's denials of involvement in the scheme do not. Moreover, there is further support from Mercer's testimony in other aspects of the record." 51 FCC 2d at 104. It is this same Mercer evidence from the Docket 19122 proceeding that is incorporated as an exhibit in the present record (Joint Exhibit 3, pp. 130–152). Thus, the Commission has concluded that the Mercer testimony is credible and this judgment stands.

48. Mr. Kiley's credibility was also considered in the prior Docket 19122 proceeding although the bulk of Mr. Kiley's testimony in the prior proceeding (Docket 19122) dealt with matters other than the Hartke matter. The Bureau's Exception 73 to the Initial Decision in Docket 19122 requested a finding that portions of Kiley's testimony were "less than candid" as his initial and rebuttal testimony displayed significant divergence (51 FCC 2d at 110). The Commission granted this exception in substance. It also should be noted that Mr. Kiley is required to deal with events that happened 15 years ago.

49. Mr. Kiley became the Local Sales Manager of WIFE in June, 1964 (Tr. 1422). This position entailed a number of responsibilities, including constant contact with Don Burden, then President of WIFE. Mr. Kiley's duties included relaying copies of sales reports

prepared by salesmen to corporate headquarters on a daily basis (Tr. 2240–42). Reports were also made on the average of several times a week by telephone to Mr. Burden (Tr. 2240). At some time after Mr. Kiley was appointed Local Sales Manager, Mr. Burden directed Mr. Kiley and Mr. Mercer, the General Manager, to handle all political time sales (Tr. 2248–49). While Mr. Kiley did not recall having done so, he handled the sale of political time to the Indiana State Democratic Committee on behalf of the Brannigan Campaign (Joint Exhibit 3, pp. 65, 258–61; Tr. 1562–63).

50. It is Mercer's account that both he and Kiley worked on the Hartke campaign political time with the work split about 50–50 (Joint Exhibit 3, p. 148). Kiley repeatedly states in the instant and prior proceeding that his involvement was purely passive (Joint Exhibit 3, p. 242; Tr. 1414, 1517–19, 1523, 2254). However, the Commission found otherwise (51 FCC 2d at 100–101).

51. It was Mercer's testimony that in order to provide the free advertising to the Senator[10], he was told by Burden to take "the necessary papers" to Hartke's office or send them by Bob Kiley, and a "patsy" would be found to sign them (51 FCC 2d at 100; Joint Exhibit 3, p. 2). Mercer was advised by Elmer Ruben, of the Ruben Advertising Agency in Indianapolis that a friend of the Senator would sign the papers and that Ruben Advertising would handle the commercial production (51 FCC 2d at 100–101; Joint Exhibit 3, pp. 2–3). Mercer then stated he sent Kiley to the Hartke headquarters with the sales contract. The contract was signed by Mace Broide, Hartke's Administrative Assistant. Burden was displeased when he learned that one so close to the Senator had signed the sales contract. Next, according to Mercer, Burden called Hartke's office and was given the name of Edward Lewis. Lewis signed a new contract on September 21, 1964 (51 FCC 2d at 101; Joint Exhibit 3, p. 3). The new contract was in the name of the Senator Hartke Democratic Campaign Committee but, Lewis had no connection with the organization and, in fact, the organization was fictitious. It is Mercer's testimony that both Kiley and Mercer went to Lewis' office to get the new contract signed (Joint Exhibit 3, pp. 134, 251). Mercer said he brought Mr. Kiley so that "somebody else [would be] aware of what was going on" (Joint Exhibit 3, p. 147). Further, Mercer stated that "We told Mr. Lewis why the contracts were supposed to be signed by him" (Joint Exhibit 3, p. 252). Mercer also stated "We turned in the contracts and aired the commercials" (Joint Exhibit 3, p. 132). The contract was for 310 60-second spots at $19 per spot for a total of $5,890 (51 FCC 2d at 101–102, Joint Exhibit 3, pp. 3–4). Mercer states that he assured Lewis that he would not be personally responsible for the

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[10] According to Mercer, the trade-off for the free time was that Burden had enlisted the help of the Senator to help with an audience rating problem Burden was having with the FCC.

amounts stated in the contract. The contract stated the commercials were prepaid, although the commercials were not, in fact, prepaid. The commercials were run and according to Mercer, no payment was expected. However, monthly bills were sent to Ruben Advertising. The debt was written off in May or June, 1965 (51 FCC 2d at 102; Joint Exhibit 3, p. 4). Kiley's typewritten name appears on the contract attached to the first broadcast order on the line captioned "to be submitted for approval" (Joint Exhibit 3, p. 174). Kiley concedes that his name appearing on this line would make him "the representative that would be involved in pulling together the contract" (Tr. 2287). During the campaign, Kiley serviced the account by transporting tapes back and forth between the Senator's ad agency and WIFE (Tr. 2254).

52. Dorothy Storz, the Star Stations' bookkeeper, testified in the prior proceeding that she prepared two cash flow statements for WIFE, the second one deleted the projected income from the Hartke spots. Mrs. Storz was ordered to retrieve all copies of the second cash flow statement. She knew there were two copies of the second statement, one being at WIFE. This copy was mailed back to Mrs. Storz by Mr. Kiley (51 FCC 2d at 102; Joint Exhibit 3, pp. 150–151). The first write-off of the Hartke bill is part of the violation previously found (51 FCC 2d at 103). The Initial Decision in Docket 19122 presents the following chronology, which is supported by documents of Joint Exhibit 3, pp. 237, 248 and 249. Haskin and Sells, an accounting firm, conducted an audit of the accounts receivable for the year ended April 30, 1965. The advertising agency to which the Hartke bills were sent replied on May 7, that it had not placed such an order. Kiley did not recall this matter being discussed in a meeting he had with a Haskins and Sells representative on June 21, 1965, but, a Haskins and Sells memorandum describes the meeting as follows:

> "We were unable to locate the contract or broadcast order supporting the billings comprising the balance at 4/30/65. We discussed the amount with Dorothy Storz and Mr. Kiley, Sales Mgr. Mr. Kiley stated that usually all of the political ads were run on a cash basis and he did not understand what happened on this account. He further stated that the entire balance would probably never be collected. See Analysis 2H for write-off of the entire balance."

(Joint Exhibit 3, p. 236). It is Kiley's testimony that collection was improbable and that non-cash political accounts were unusual. He stated that political accounts are not collectable since all that is left is "confetti on the ground" (Tr. 1542). However, on cross-examination, Kiley conceded that when dealing with established political figures, whose credit worthiness was not subject to doubt, credit would often be extended (Tr. 2293–95). Mr. Kiley also conceded that Hartke had won the election and thus this was not a situation of a campaign office with nothing but confetti on the floor (Tr. 2292–93).

53. It is Kiley's position that Mercer was never really cross-examined on Kiley's role in the Hartke matter since the prior hearing dealt primarily with Hartke's free advertising time and whether Burden was the instigator of this scheme. Kiley points to his testimony in the Docket 19122 proceeding where he denied knowing Mace Broide or even having met him prior to that hearing. No copy of the Broide contract was ever introduced into evidence in Docket 19122 and no such copy has ever come to light. Mace Broide denies that he ever signed a contract for the purchase of advertising time on WIFE during the 1964 campaign (Circle City Exhibit 26). Broide denied knowing Robert Kiley and could not identify him at the time of the hearing in Docket 19122 (Circle City Exhibit 26, p. 7). Broide denied using a felt-tipped pen to sign the contract. Broide states that the Continental Hotel, where Mercer claims he sent Kiley to get the signature, was actually the hotel where Broide stayed with his family and he did little campaign work from that location. In summary, Broide denies that he signed any contracts for the acquisition of time on WIFE to promote the Hartke campaign of 1964. Kiley too denies his involvement in obtaining a contract signed by Mace Broide (Tr. 1522–24, 1529, 1536). Kiley also denies any real association with the so-called Lewis contract. Kiley testified in the Docket 19122 proceeding that he was simply going out to lunch with Mercer, which was not unusual, and Mercer said he had to stop by and see one of his clients (Tr. 1517–19; Joint Exhibit 3, pp. 241–42). Mercer never told Kiley what the visit was about. Mercer did introduce Kiley to Lewis but Kiley states he did not participate in the short discussion between Mercer and Lewis. Kiley said he did his best not to intrude into the conversation between Mercer and Lewis and he felt like a "fifth wheel" and basically tried to "fade into the woodwork". Kiley states he had never seen Lewis before that date and has not seen him since (Tr. 1518–20, 2225–26; Joint Exhibit 3, pp. 69–70, 240–42). Kiley states that with respect to Mercer's claim that Kiley did half or more of the work on the Hartke matter, that only Mercer is shown as the person to sign the contracts and each of the total of five contracts were signed by Ron Mercer and the contracts were prepared in a manner which showed they were handled by Mercer (Tr. 1503–04). On the one contract on which Kiley's name is typed, the contract was signed by Mercer and Kiley denies knowledge of why his name was typed on this particular contract (Circle City Exhibit 21, p. 5).

54. Another element to test Kiley's association with the Hartke matter is the issue of who received any sales commission on the Hartke account. Kiley denies that he received any such commission (Tr. 1453, 2243–44, 2302–05). But there was a stipulation in Docket 19122 that Kiley, as Sales Manager, was entitled to a bonus on the

basis of regional sales, which included the Hartke spots (Tr. 2243–44). It is Kiley's position that he received a salary from WIFE plus a bonus, based on a percentage of local sales only (Tr. 2242). Star Exhibit 3 in the Docket 19122 record lists the Hartke campaign as a regional account (Tr. 2302–03). It shows various Hartke contracts during September and October, 1964 as including the Lewis contract as a regional account (Tr. 2302–04). Kiley was also shown Star Exhibit 8 from the Docket 19122 record which is a list of commissions Kiley received for the first 5 and 1/2 months of 1964. The list was prepared by Mrs. Storz and sent to Mr. Burden on January 11, 1965. Kiley is listed as having received $1,085.95 in commissions on net local AM and regional sales (Tr. 2305). Kiley, after review of Star Exhibit 8, initially denied receiving such commissions (Tr. 2306). Kiley stated he wished he had known that he was entitled to a bonus on political sales, including the Branningan and Hartke accounts, but denied being aware of it at the time (Tr. 2307–08, 2316, 2345).

Kiley Conduct Regarding WIFE Employees Porter and Byers

55. Issue 19 in Docket 19122 reads as follows: "To determine whether Star Broadcasting, Inc. and/or its principals and agents have engaged in efforts to coerce, harass, and intimidate employees and former employees of stations WIFE, WIFE-FM [other Star stations omitted] for the purpose of frustrating or interfering with the Commission's processes."

An aspect of the resolution of Issue 19 related to the conduct of Mr. Kiley with respect to interviews by Commission investigators of WIFE employees, Bud T. Porter and T. J. Byers. Messrs. Porter, Byers and Kiley all testified in Docket 19122. Only Kiley testified in this proceeding. The Commission's determination on Issue 19 is as follows:

> "Kiley refused to permit Commission investigators to question employees in 1969 until they had been offered and accepted the assistance of Star's Counsel" (51 FCC 2d 107, Joint Exhibit 2, p. 2[11]).

The Commission, referring to this incident and others, ultimately concluded on this point as follows:

> "In sum, Star's principals and employees have demonstrated a pattern of conduct which we find reprehensible, which bears on the question of the licensees' likely future conduct, and which

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[11] These findings and conclusions of the Commission in Docket 19122 are the subject of extensive argument by counsel for Circle City as to whether such findings and conclusions are now binding on Mr. Kiley. Briefly, Circle City argues that the Judge in the Initial Decision in Docket 19122 had exculpated Kiley with respect to the Porter and Byers matter. The Commission then reversed the Judge, based on an exception filed by the Bureau. The Commission granted in substance the Bureau's exception and counsel for Circle City argues there is no citation for the Bureau's exception and the basis for the exception does not exist in the record.

> must be considered in the ultimate determination in this proceeding." (51 FCC 2d 107, Joint Exhibit 2, p. 2).[12]

It is Kiley's testimony both in Docket 19122 and this proceeding, that he was merely following the advice of Star Station counsel - Joel H. Levy, Esq. At the time of the event in question, December 4, 1969, Mr. Kiley was Vice President and General Manager of WIFE and Messrs. Porter and Byers worked as WIFE staff employees (Tr. 1708–09). The Commission investigators had interviewed Mr. Kiley with respect to the Hartke matter including questions as to program coverage of the Hartke campaign on December 3, 1969 (Tr. 1714–15). The Commission investigators returned to WIFE on December 4, 1969 and advised Mr. Kiley that they wished to interview Messrs. Porter and Byers,[13] both of whom were at the station at that time. Mr. Kiley did not contact either Porter or Byers until after he had first discussed the matter with WIFE's counsel - Mr. Levy (Tr. 1696). Mr. Kiley then contacted Porter and Byers. Kiley states he was under orders from Burden to consult with Star legal counsel on all FCC matters, which is why he first sought out Levy (Tr. 1723, 1732). Kiley states that Levy told him to inform Porter and Byers that they had three choices as follows: Levy could represent them at the interviews by FCC investigators; they could have someone else represent them, or they could speak to the FCC investigators without representation (Joint Exhibit 2, p. 22; Tr. 1697–98). It is Kiley's testimony that when he presented Porter and Byers with the three options, he did not wait around for their answer (Tr. 1699), he did not participate in the interviews, he did not know what happened and he did not know for years what choice of options Porter and Byers had made. Porter and Byers opted for Levy's assistance (Tr. 1703, 1719–20, 1724). Other than this one occasion on December 4, 1969, there was no other occasion when WIFE had paid counsel for its employees (Tr. 1712–13). It appears that while Porter and Byers were given the option of obtaining their own legal counsel for purposes of the FCC interview, there was no time to exercise such option before they saw the FCC investigators (Tr. 1719). Also, there was no discussion if Star Station would pay for outside counsel (Tr. 1698). However, Kiley was unaware of any obligation of WIFE to furnish outside counsel for its employees (Tr. 1711). Porter and Byers testified in Docket 19122 that they voluntarily chose Levy's services without coercion and they were not charged for such services (Joint Exhibit 2, pp. 4, 14, 19).

Kiley's Involvement in the Harassment of Mercer

56. In the Docket 19122 proceeding, the Commission specified an issue against the stations as follows:

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[12] See footnote 11, *supra*.

[13] Porter was the announcer on duty at the time and Byers was producing commercials at the time.

> To determine whether Star Broadcasting, Inc. and/or its principals and agents have engaged in efforts to coerce, harass, and intimidate employees and former employees of Stations WIFE, WIFE-FM [other Star Stations omitted] for the purpose of frustrating or interfering with the Commission's processes.

Evidence under this issue implicated Mr. Kiley which matters were addressed in Docket 19122.

57. Mr. Mercer was the WIFE General Manager from 1963 to the end of 1965 (51 FCC 2d at 97; Joint Exhibit 1, p. 5). Burden had fired Mercer after the disclosure of the Star Station fraudulent billing practices.[14] However, Burden did offer Mercer a position as the West Coast Director of Sales. Mercer declined the offer and joined an advertising agency in Indianapolis - Clark and Mercer (Joint Exhibit 1, pp. 43, 80–83; Tr. 1534). After Mercer had left the employ of WIFE, he testified against WIFE and for the Bureau in the November, 1966 hearing concerning fraudulent billing and the carriage of two contests. He also testified against WIFE in the 1971 hearings relative to the 1964 coverage of the Hartke campaign. It was the belief of Burden and other members of the WIFE staff that Mercer had not given truthful testimony to the Commission in the 1966 hearings. Burden, however, did not wish to antagonize Mercer and wrote a memorandum to all Star Stations' management on "Ron Mercer". The memo states in pertinent part as follows:

> I am writing this memorandum to request that you say absolutely nothing to anyone regarding Ron's dismissal, other than that Ron's wife is an Indianapolis girl and her mother is ill, which made the transfer virtually an impossibility to consider in the final analysis of the situation.
>
> I have reason to believe that Ron Mercer will be going into the Advertising Agency business in Indianapolis and anything derogatory or defaming said against Ron will only come back to haunt us hundreds of times over . . . (Joint Exhibit 1, p. 137).

Subsequent to the 1966 hearing and before the 1971 hearing, Mercer believed he had been subjected to harassment and intimidation by Burden and Station WIFE. Mercer's belief was based on the manner in which he was treated by the station in his advertising agency business, by the fact that Burden had taken out a full-page newspaper ad in 1969, which caused Mercer problems, by the fact that anonymous phone calls were made to him and his business associate, that Burden had been in touch with Mercer's ex-wife and one of his former business associates seeking derogatory information, that Mercer was not permitted to attend a client party given at WIFE, that adverse information about Mercer was sent to his clients anonymously and that cars would drive slowly past his house in 1969–1970, shutting off their lights at night.

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[14] Burden said he fired Mercer, but, this is debatable. See paragraphs 32, 33, 34, *supra*.

58. Based on these Mercer charges, the Commission found in paragraph 37 of the *Decision,* (Joint Exhibit 1, p. 10) that: *bb3 At WIFE, a concerted effort was made to harm Mercer in earning a livelihood as an advertising agent and in his business reputation after he left the station. See paragraphs 10 and 12, *supra.* Paragraphs 10 and 12 of the Commission's *Decision* state as follows:

> 10. Nor do we agree that the record establishes that Mercer consciously attributed harassing incidents to Burden which, he knew, were the responsibility of Charles Pitman. Bureau counsel elicited the testimony in question. Counsel asked Mercer "whether or not Station WIFE or any of its officers or employees have done anything to injure you in your [advertising] agency business?" Mercer testified, inter alia, that WIFE on several occasions refused to recognize or do business with him as an advertising agency; that Burden ran a full-page ad injuring Mercer's agency business; that anonymous phone calls were made to associates and relatives during a period from August, 1969, to June or July, 1970; and that, when he moved into a new house, cars would drive slowly back and forth, shutting off their lights at night. Finally, Bureau counsel asked Mercer "do you have any knowledge of anyone else who you know who you've had past dealings with, other than Mr. Burden, who would have any reasons to do these things that you've just related?" Mercer responded "None at all."
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> * * *
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> 12. The Judge found that Mercer had knowingly attributed the incidents from Pitman's investigation to Burden, and Star's counsel's [sic] maintained at oral argument that the incidents "fit like a glove." We cannot agree. Pitman was not the only person who had investigated Mercer; Burden had also. See Findings 119 and 122, I.D. Burden contacted Mercer's ex-wife and one of his former business associates in an effort to obtain adverse information about Mercer; and he struck out at Mercer, attempting to damage him in his business activities. When Pitman confronted Mercer with the fact of his investigation, Mercer responded that he had heard that "there were others investigating him." Moreover, it does not appear that Pitman could have been responsible for the surveillance by cars which Mercer described since Pitman terminated his investigation when he gave possession of his house to Mercer, and since the

particular incidents to which Mercer testified did not start until after Mercer moved into the house. (Joint Exhibit 1, pp. 7–8)

As can be seen from the above discussion in the Commission's *Decision* of the harassment or intimidation charges, none were specifically found to be the responsibility of Mr. Kiley. Kiley would be involved only insofar as he may have been a part of the "concerted effort" (paragraph 37 of the *Decision*) at WIFE to harm Mercer in earning a livlihood as an advertising agent, or, insofar as Kiley may have been implicated in the finding (paragraph 10 of the *Decision*) that WIFE on several occasions refused to recognize or do business with Mercer as an advertising agency.

59. The Initial Decision in Docket 19122 had found in paragraphs 217 and 218 that Star's conduct toward Mercer was a result of hostility and fury which fell short of an attempt to harass or intimidate a witness (Joint Exhibit 1, p. 31). The Bureau took exception to this part of the Initial Decision in its Exceptions 72, 74 and 92 and such exceptions were "granted in substance, as indicated in the Decision". The Bureau's Exception 73 dealt specifically with the testimony of Robert Kiley in Docket 19122 and this exception was "Granted in substance, as indicated in the Decision". However, the Decision in Docket 19122 does not once mention Robert Kiley by name as being responsible for any actions taken against Mercer, nor does it find that Kiley had some defect in character as the result of the manner in which he, as distinguished from Burden, allegedly treated Mercer.

60. It is against this background that Kiley's behavior *vis a vis* Mercer is re-examined in this proceeding to determine whether in the words of Issue 19 in Docket 19122, Kiley "engaged in efforts to coerce, harass, and intimidate [Mercer] for the purpose of frustrating or interfering with the Commission's processes".

61. When Mercer left WIFE in December, 1965, Burden gave instructions to all management personnel, which would include Kiley, not to speak ill of Mercer or tell anyone outside of WIFE the real reason for his dismissal (Joint Exhibit 1, p. 137). Kiley stated he followed Burden's instructions and from December, 1965 to November, 1966, he treated Mercer's advertising agency like any other (Joint Exhibit 1, pp. 42, 50, 53). During the period November, 1965 to November, 1966, Kiley ran advertising on WIFE for approximately 25 of Mercer's clients (Joint Exhibit 1, p. 44). However, Kiley was aware that Burden was very unhappy with Mercer's testimony at the Docket 19122 hearing (Tr. 1594–95). Burden had testified that he did not have to tell his staff about his change in feelings toward Mercer since everyone else "felt the same thing" (Joint Exhibit 1, p. 128).

62. It was during the second WIFE hearing that Mr. Mercer testified that he had been harassed by WIFE representatives after he

gave testimony adverse to WIFE in the first hearing (Joint Exhibit at 78 *et seq.*). The incidents cited by Mercer at the second hearing are briefly summarized.

63. Mercer cited the 1969 WIFE full-page newspaper advertisement attributing WIFE's problems with the FCC to "the then station manager" who everyone in the Indianapolis business community knew to be Mr. Mercer and he had also spoken of the station manager's blatant disregard of company practices and policies for which he was summarily dismissed (Joint Exhibit 1 at 143).[15]

64. H. C. Disney, President of First National Bank and Trust of Plainfield, Indiana was a client of Mercer and reported to Mercer a conversation he had with Kiley in May, 1970 at the Indianapolis 500 qualification trials. Disney stated that Kiley blamed all of WIFE's problems on Mercer and told Disney that Mercer had ruined the station (Joint Exhibit 1 at 97).

65. Mercer testified that the President of Y & W Management, Vern Young (a long-time friend of Kiley's) had a conversation in 1969 with Jack Marsala, the Sales Manager of WIFE. Marsala told Young, a client of Mercer's, that WIFE was not going to recognize Mercer as an advertising agency and that Mercer was going to have further problems with WIFE. Because of this, Mercer testified that Young told him he would no longer do business with Mercer. Young had testified in the prior hearing that he had decided not to use Mercer as an advertising agent because Marsala or Kiley told him ". . .there may be a problem in placing advertising with WIFE for me through Mr. Mercer" (Joint Exhibit 1, at 119–20).

66. Mercer was the advertising agent for Danners Five & Ten Cent Store. Mercer testified that WIFE required him to pay in advance for advertising time purchased for Danners and made this known to the company's director of marketing, John Brown. According to Mercer, Brown concluded that Mercer was not substantial enough and terminated Mercer as the advertising agent for Danners (Joint Exhibit 1 at 103).

67. Mercer stated that Bud Gates of Gates Toyota said that Kiley and Marsala made derogatory remarks about Mercer when Gates was considering retaining Mercer as his advertising agent (Joint Exhibit 1, p. 101).

68. Mercer recalled that in early 1971, Kiley required Simpson-Stygall, a client of Mercer whose advertising had been run by WIFE, to pay Mercer's commission directly to Mercer, contrary to usual industry practice. Stygall contacted Kiley about Mercer's commission who then related his conversation with Kiley to Mercer which was in substance "we do not do business with Ron Mercer. We don't recognize him as an advertising agency and therefore we're not paying him a commission" (Joint Exhibit 1 at 87).

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[15] This newspaper advertisement is also considered in paragraph 32, *supra*.

69. Mercer testified that in 1969, he had been invited to the WIFE annual Christmas party for advertising agents and their clients. Kiley rescinded the invitation because he and Burden felt Mercer should not be permitted in the station. Mercer was the only advertising agency excluded from this party to which approximately 800 people had been invited (Joint Exhibit 1, pp. 69–70). Mercer stated that one of his clients, Bob Corum of Wig Warehouse, did attend the party and Corum was approached by a number of WIFE personnel who made derogatory remarks about Mercer and accused Mercer of making up dishonest invoices at WIFE. Corum related this to Mercer and told Mercer "because we can't take a chance", Wig Warehouse decided to terminate its relationship with Mercer (Joint Exhibit 1, pp. 101–02).

70. Kiley acknowledged making negative comments about Mercer, but denied in December, 1971 having instructed any WIFE salesman to tell Mercer's clients that WIFE would not accept business placed through his agency because of Mercer's poor credit (Joint Exhibit 3, pp. 87–88). Kiley acceded that Mercer was not in arrears with the WIFE stations on his accounts (Joint Exhibit 1, p. 58). Kiley also has testified that during the second WIFE proceeding, he did reflect his attitude towards Mercer ". . . to some people . . . when I was asked" (Joint Exhibit 1, p. 53). Kiley also admitted telling Vern Young that if he were Young, he would not have any dealings with Ron Mercer. He knew at the time that Mercer was Young's advertising agent (Joint Exhibit 1, p. 53).

71. Kiley also admits that he did handle one of Mercer's accounts in a different way and this involved the Simpson-Stygall account after Mercer had left the Donegan Advertising Agency (Tr. 1602–03). In this case, WIFE sent the bill for advertising directly to the client Stygall, who paid the entire bill. Later, Stygall called or wrote WIFE and asked Kiley to send Mercer his 15% commission. Kiley told Stygall that he was willing to accept Mercer's business at WIFE, but, he (Kiley) would prefer to send Stygall the commission check and Stygall forward the check to Mercer. Kiley refused to explain his reasons for handling the account in this manner. Normally, the billing would be handled through the advertising agency - in this case, Mercer. Kiley closed out his explanation with Stygall by stating that he (Kiley) respected Stygall's choice of advertising agents but wished Stygall would respect Kiley's reasons for wanting to pay the commission in this unusual way (Tr. 1611–12). Kiley explains his actions on the Stygall account in this proceeding. Kiley now states that he knew he was to testify in the second WIFE proceeding and thus wanted to avoid what he believed could be inconsistencies between his upcoming testimony and the manner in which he dealt with Mercer in business affairs. Kiley admits that he was leery of Mercer's business scruples based on Mercer's past association with the WIFE station and by opinions Kiley claims to have received from

four advertising agencies where Mercer had worked before he formed his own agency. The four agencies, according to Kiley, had informed him that they found Mercer to be less than honest (Tr. 1607–09). Thus, reasoned Kiley, he did not want Mercer's name on any contract entered into by WIFE and he did not want a WIFE check going to Mercer. Kiley reasoned that he believed that he would be hard pressed if required to explain at the second WIFE hearing his belief that Mercer is a dishonest person and yet he had accepted Mercer's signature on a contract with WIFE. When Kiley was not in business for himself, advertising contracts could be executed without Mercer's name appearing thereon (Tr. 1609, 1611, 2430, 2444). Kiley now recognizes that this explanation sounds illogical, but insisted it was the truth (Tr. 2451). Kiley could not recall on cross-examination just which document produced his reaction to Mercer's part in the Stygall account. His testimony appears to relate to the check for Mercer's commission, but he (Kiley) recognizes that there must also have been an order with Mercer's signature on it (Tr. 2447–48). Kiley denies having said anything to Stygall that would be damaging to Mercer (Tr. 1554–55, 1557), but admitted that his recall of the Stygall incident in 1971 was better than 1979 (Tr. 2554). Kiley was aware that in July, 1970, Mercer had only one WIFE advertising account - Simpson & Stygall (Tr. 2405). This being the case, Kiley was also aware that making matters difficult for Mercer would not impact adversely on the WIFE billings (Tr. 2406). Kiley did recall toward the end of the instant hearing, that WIFE had treated one other advertising agency - Venus Advertising - in a manner similar to that of Mercer on the Stygall account. But there is no evidence of when this occurred and the nature of the problem is not clear except it possibly involved "communications problems" between Venus and its clients. Other aspects of this transaction are not clear in the record (Tr. 2409, 2410, 2423, 2429, 2431 and 2439).

72. In the instant proceeding, Kiley said it was exclusively Burden's idea to disinvite Mercer from a WIFE client party (Tr. 1586–87). Kiley denied making any derogatory remarks to Bud Gates about Mercer (Tr. 1586) or making any remarks that were responsible for Mercer's losing the Danners account (Tr. 1587–88). Kiley denied knowing or speaking to Mr. Disney (Tr. 1588–89). He denied having anything to do with Mercer's loss of the Wig Warehouse account and he denied having done anything to dissuade Mercer from testifying in the second WIFE proceeding (Docket 19122) (Tr. 1555). However, Kiley admits that the periods of time at issue here, i.e., the time Mercer claims he was being treated in an unusual manner is the same period Mercer was to testify against the Star Stations (Tr. 2426).

Summary Decision Consideration of Issue 2(a)

73. A request is pending to resolve Issue 2(a) in this proceeding

by summary decision and this matter is now considered. No party has opposed the resolution of the issue favorable to Indianapolis Communications Corporation (ICC). This issue requires a determination as to the effect of the fire loss litigation involving Mr. Edward A. Zebrowski upon the ability of ICC to secure its proposed $500,000 bank loan. At the time the issue was designated, Mr. Zebrowski was one of the guarantors, along with Messrs. John R. Nichols and Leonard E. Walk on the ICC bank loan from the American Fletcher National Bank in Indianapolis. ICC has subsequently secured a loan commitment for $500,000 from the Pittsburgh National Bank which requires the personal guarantees of only Messrs. Nichols and Walk. The Pittsburgh National Bank commitment letter, omitting Mr. Zebrowski as a guarantor, was accepted by an amendment to the ICC application by Order (FCC 78M–1425) released September 26, 1978. With this ICC amendment to its application, the resolution for the fire loss litigation involving Mr. Zebrowski is no longer relevant to the resolution of the issue and there remains no fact in dispute with respect to Issue 2(a). Accordingly, summary decision is granted favorable to ICC on Issue 2(a) as set out in the Designation Order.

Issue 2(b)

74. As indicated *supra*, subpart (a) of Issue 2 has been resolved by summary decision and Issue 2(b) likewise involves Mr. Zebrowski and his failure to report certain litigation to the Commission. Prior to the time the Designation Order was issued, ICC contended that this failure to report was unintentional. Zebrowski stated he expected to be removed as an individual defendant in forthcoming litigation. However, the Commission held that ICC had an apparent motive to conceal, which raised questions which could not be resolved without a hearing (Designation Order, para 28).

75. Prior to the hearing, the parties were required to exchange written testimony and ICC exchanged the written testimony of Zebrowski, Walk and Nichols (ICC Exhibits 11, 12 and 13). None of the other parties requested these persons for cross-examination and their testimony is therefore uncontested.

76. Zebrowski testified that in 1973, Zebrowski & Associates, Inc. (Z, Inc.) was awarded a contract by the Indiana National Bank to demolish the Grant's Building in Indianapolis. On November 5, 1973, after demolition had commenced, the Thomas Building next door to the Grant Building burned down. At the time, Mr. Zebrowski was in Japan (ICC Exhibit 13, p. 1).

77. Several lawsuits were filed as a result of the fire naming Z. Inc., among others, as defendants. Twelve of the suits, requesting damages aggregating in the millions of dollars, named Zebrowski individually (ICC Exhibit 13, p. 11, Attachment A, p. 1). All of the suits named multiple defendants. Included as defendants are the Indiana National Bank, W. T. Grant Company, the City of Indianap-

olis, the City Fire Force of Indianapolis and Citizens Gas and Coke Utility, among others (ICC Exhibit 13, p. 1).

78. It is Zebrowski's testimony that his personal financial statements are prepared by accountants or bookkeepers on his staff and none of Zebrowski's personal financial statements contain a reference to the pending fire litigation (ICC Exhibit 13, p. 1). One of these statements, dated June 30, 1977 (ICC Exhibit 13, Attachment C), was submitted to the Commission on August 3, 1977 as an amendment to the ICC application (ICC Exhibit 13, p. 1). Zebrowski had been advised by his local counsel, in a January 9, 1978 letter (ICC Exhibit 13, Attachment B), that there was no legal basis upon which Zebrowski could be held personally liable in the litigation (ICC Exhibit 13, p. 3). Zebrowski also stated that from the outset of this litigation, his local attorney had advised that there was no basis in law or fact to involve Zebrowski as an individual as a defendant in any of these lawsuits. The local attorney had taken some steps to have Zebrowski as an individual, removed as a defendant, but this had not yet been accomplished (ICC Exhibit 13, Attachment B, p. 1). Accordingly, Zebrowski testified that it never occurred to him to include a reference to the litigation in his June 30, 1977 financial statement (ICC Exhibit 13, p. 2). The reason for the ICC submission of the Zebrowski financial showing to the Commission on August 3, 1977 was that Zebrowski had a financial commitment to ICC of $9,750, later increased to $11,100 and the showing was intended to demonstrate that Zebrowski had current assets above current liabilities to meet his commitment to ICC and that his net income, after taxes, for the previous two years exceeded $50,000 per year (ICC Exhibit 13, p. 2, Attachment D). This same financial showing as sent to the Commission on August 3, 1977 was also provided to the Indiana National Bank where ICC had secured a commitment letter.

79. On July 5, 1977, the Commission sent a deficiency letter to ICC which raised questions about the then-existing commitment letter from the Indiana National Bank (ICC Exhibit 13, pp. 3–4). Since the Commission was questioning the sufficiency of the bank's commitment letter, Zebrowski and John R. Nichols approached the bank in an attempt to obtain a bank letter acceptable to the Commission. The bank advised that such a letter from them would require a $5,000 commitment fee and the interest rate on the proposed loan would be 1 1/2% above prime. Both Zebrowski and Nichols considered the bank's terms excessive and decided to seek another bank (ICC Exhibit 13, p. 13).

80. Nichols then contacted the American Fletcher National Bank (AFNB) which offered more acceptable terms. The personal guarantors of Nichols, Walk and Zebrowski were required by AFNB and were provided. Zebrowski's personal guarantee was supported by his personal financial statement dated June 30, 1977, which made no mention of pending fire litigation (ICC Exhibit 13, p. 3).

81. Later, Zebrowski approached the AFNB for a personal real estate loan in the amount of $225,000. AFNB originally advised Zebrowski that it could make the loan, but, subsequently advised that because of the fire litigation, AFNB's legal department recommended against the loan. Zebrowski eventually obtained the loan elsewhere (ICC Exhibit 13, p. 4).

82. Although it has declined Zebrowski's personal loan, AFNB did not alter its commitment to ICC. Zebrowski testified that when the ICC commitment expired in the summer of 1978, AFNB offered to renew it on the same terms and conditions as previously existed (ICC Exhibit 12, Attachment B, p. 1). However, Leonard Walk was able to obtain a still more favorable commitment from the Pittsburgh National Bank (ICC Exhibit 11, Attachment B, p. 1). Since at this time the Commission questioned Zebrowski's guarantor status, he was removed as a guarantor of the Pittsburgh National Bank commitment (ICC Exhibit 13, p. 4).

83. Zebrowski insists that he had neither intention nor motive to misrepresent his financial condition. He testified that he never discussed with counsel, bookkeepers or any person whether the litigation should be referenced in his personal balance sheet or reported to the Commission (ICC Exhibit 13, p. 4). The accounting firm which prepares financial statements for Z. Inc. has routinely included the following note in corporate statements:

> *NOTE 5 - CONTINGENCIES*
>
> The Company has been named as a defendant, along with certain others, in lawsuits amounting to $6,850,000. These lawsuits resulted from a fire that destroyed or damaged certain properties in downtown Indianapolis, including destruction of a building the Company was in the process of demolishing.
>
> In view of Counsel, there may be other lawsuits which will be filed before the statute of limitations runs out as a result of this substantial fire loss. The damages claimed exceed by a substantial amount the insurance coverage held by the Company. Although the ultimate outcome and effect, if any, of this litigation is not determinable at the present time, the Company knows of no facts which would render it liable for the damages incurred, and has assisted in the investigation of this fire loss (ICC Exhibit 13, p. 5).

84. Zebrowski's testimony is that having been advised by counsel that there was no basis for his personal liability for the fire, he was unaware that such a note was also required in personal financial statements (ICC Exhibit 13, p. 5). The testimony of Walk and Nichols on this issue relative to securing bank commitments parallels that of Zebrowski (ICC Exhibit 11, p. 1; ICC Exhibit 12, pp. 1–3).

Proposed Findings of Fact on Issue 3
The Comparative Case

Peoples Broadcasting Corporation (Peoples)

85. Peoples is an Indiana corporation. It is composed of the following shareholders: Joseph Cantor, who owns and has subscribed to 45.5% of the stock; Daniel Cantor, 42.0% of the stock; Andrew C. Johnston, 10.0% of the stock and Linda C. Jubert, 2.5% of the stock.[16] (Peoples Exhibit 7).

86. *Joseph Cantor*, President, Treasurer and Director of Peoples was born in New York City and raised in New Haven, Connecticut. He moved to Indianapolis in 1933 as manager for United Artists Corporation. In 1936 he decided to make his permanent home in Indianapolis, and he presently resides in Carmel, Indiana, a few blocks outside the city limits of Indianapolis (Peoples Exhibit 1; Tr. 875–76).

87. Joseph Cantor has been a movie exhibitor since 1936, operating several theatres in Indianapolis. In addition, he serves as President and Treasurer of Center Development Corporation and Cumberland Amusements, Inc. He also owns 52% of the stock of Lafayette Road Corporation, which owns and operates four indoor theatre screens, four outdoor theatres,[17] a 26-unit townhouse development and an investment portfolio. He serves as its President, Treasurer and Chief Executive Officer and presently spends 15–20 hours a week on Lafayette's business (Peoples Exhibit 1).

88. Joseph Cantor has been active in the Indianapolis Variety Club, the Indianapolis Multiple Sclerosis Society, the Boys Club of Indianapolis and the Indianapolis Museum of Art. In addition, he has been active in the support of the Will Rogers Hospital and presently serves as Director of the Jewish Welfare Federation and the American Jewish Committee of Indianapolis. He is also a contributing member of the Museum of Modern Art and Associate Member of the Guggenheim Museum, both of which are in New York City (Peoples Exhibit 1).

89. Joseph Cantor will be the Chief Executive Officer of the proposed station and will work on a full-time basis, devoting approximately 40 hours per week to the station's operation (Peoples Exhibit 1).

90. *Daniel Cantor*, Joseph Cantor's son, is Assistant Treasurer and a Director of Peoples. He was born in Indianapolis, and, except

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[16] Proportionate interest based upon respective holdings in Lafayette Road Corporation, the owner of 871;2% of Peoples, a corporation wholly-owned by the Messrs. Cantor. Percentages based on Johnston and Jubert's stock options.

[17] There are 61 independent movie exhibitors in Indianapolis whose indoor theatres number 61. The dominate force in the Indianapolis market is the General Cinema chain which has 25 indoor screens (Tr. 817).

for periods of time spent away at school, has been a lifetime resident. He attended elementary and junior high schools in that city, and he graduated from Miami University of Ohio in May, 1978. He is currently enrolled in a Master of Business Administration program at Indiana University (Peoples Exhibit 3).

91. Daniel Cantor has been involved in extracurricular activities during his school years, participating in the Heart Fund Drive, performing volunteer services for the Miami Speech and Hearing Clinic and for the Speakers Bureau. Mr. Cantor obtained his FCC Third Class Radiotelephone License with Broadcast Endorsement in December, 1978 (Peoples Exhibit 3).

92. Daniel Cantor is 100% owner of Center Development Corporation and Cumberland Amusements, Inc. However, he has no day-to-day responsibilities with respect to these businesses. He also owns 48% of the stock in Lafayette Road Corporation and serves as its Vice-President. Although he has no substantial responsibilities in connection with the business operations of Lafayette, he does devote 15–20 hours to Lafayette and he has spent school vacations and the past three summers assisting in the theatre and apartment operations of Lafayette (Peoples Exhibits 2 and 3; Tr. 807–09).

93. Daniel Cantor will devote a minimum of 30 hours per week to the proposed radio facility and is prepared to spend up to 60-70 hours a week should his responsibilities at the station require it (Peoples Exhibit 3; Tr. 904–05).

94. *Andrew C. Johnston*, a Vice-President and 10% owner of Peoples, was born in Anniston, Alabama. He moved to Indianapolis in 1971 and has lived there ever since. He attended schools in Alabama and Tennessee and received a Bachelor of Arts degree from the University of Alabama in 1969. He also completed six hours of graduate work in urban affairs at American University in Washington, D.C., and in 1974, he completed the National Association of Broadcasters Management Seminar conducted by the Harvard Graduate School of Business. He is currently attending the Indiana University School of Law in Indianapolis. Mr. Johnston will discontinue his legal education in the event that Peoples is awarded the construction permit (Peoples Exhibits 6 and 8).

95. Mr. Johnston, after graduating from college, began working for the Department of Health, Education and Welfare. In December, 1970, he was selected by the Secretary of HEW to work with the Indianapolis City Government. In August, 1971, Mr. Johnston accepted the position of Deputy Administrator of the Indianapolis Model Cities Program. He resigned this position in 1972 and was appointed by the Mayor of Indianapolis to serve on the Model Cities Neighborhood Board. He also joined Frank Perry Lloyd & Associates, Inc. (FPL&A) as Treasurer, Managing Consultant and 7% shareholder. Although originally formed to provide health care consulting services to cities throughout the country, in late 1972, it acquired

control of WTLC-FM, Indianapolis and in February, 1973 assumed responsibility for the operation of the station. Mr. Johnston, a 7% owner of the licensee, became Treasurer and Director, but continued to be primarily involved in the health care consulting operations of FPL&A. However, in 1973, FPL&A discontinued the health planning consulting business and concentrated its efforts on radio broadcasting. Mr. Johnston obtained his First Class Radiotelephone License and in October, 1973, immediately after getting the license, commenced full-time participation in the operation of the radio station. In February, 1974, Mr. Johnston was appointed General Manager of WTLC, and in August, 1974, he became General Manager of WWWS-FM, Saginaw, Michigan, a licensee controlled by FPL&A through a limited partnership, Saginaw Broadcasting Company (SBC). FPL&A was the general partner in SBC and Mr. Johnston was a limited partner. He continued in these positions until September, 1976 when he sold his broadcast interests and became associated with Peoples. Mr. Johnston is also Assistant Treasurer of Lafayette (Peoples Exhibit 8).

96. *Linda Jubert*, a Black female, is Vice-President and a Director of Peoples. She was born in New York City and she attended elementary school and high school there and completed approximately 2 1;2 years of course work at New York City's Hunter College. She moved to Indianapolis in 1971 (Peoples Exhibits 2 and 7).

97. Ms. Jubert first became involved in broadcasting in 1969 when she joined WPIX Radio and Television in New York City. Between November, 1971 and February, 1973, Ms. Jubert worked in the Credit Department of Winona Hospital and as office manager for a local recording studio. In February, 1973, she became office manager for WTLC Radio in Indianapolis and in November, 1973, she left WTLC and became Traffic and Bookkeeping Assistant with Mid-America, Inc., licensee of WIRE and WXTZ in Indianapolis. Ms. Jubert acquired her Third Class Radiotelephone License while employed at Mid-America. In 1976, she resigned her position with Mid-America and assumed her present position as Administrative Assistant with the State Plan Office of the Indiana Opportunities Industrialization Centers of America. For a period of three months in 1977, Ms. Jubert left the Center to become an Account Executive for radio station WIRE and thereafter returned to the Center (Peoples Exhibits 2 and 7).

98. Ms. Jubert has been active in the National Association for the Advancement of Colored People and is currently Secretary of the Indianapolis Chapter of Africare, Inc. In addition, Ms. Jubert is Assistant Coordinator for Concerned Ministers, Inc. of Indianapolis and serves as Secretary of the Board of Directors of the Indiana Opportunities Industrialization Center, Inc. State Council (Peoples Exhibits 2 and 7).

99. Peoples proposes to operate the station through four policy committees,[18] the members of which will be appointed by the Board of Directors, and four operating departments.[19] The day-to-day operations of the station will be overseen by the General Manager and the Chief Executive Officer. The four operating departments will each be headed by a department manager. The Sales Manager will report to the Chief Executive Officer, while the managers of News, Programming and Operations Departments will report to the General Manager. Each department manager will be responsible for the day-to-day supervision of the personnel and functions of his/her department and the implementation of policy delineated by the policy committees (Peoples Exhibits 1–3, 6).

100. Joseph Cantor will serve as Chief Executive Officer, devoting approximately 40 hours a week to the station's operations. He will serve as Chairman of the Finance Committee and will have ultimate responsibility for financial management of the station. As a member of the remaining policy committees, he will be involved in the day-to-day policy and management decisions of the radio station. In addition, he will be involved in the area of public affairs, and he will have direct responsibility for the sales department manager. He will also assist in the selection of topics and guests for the "Indianapolis Today Show" (Peoples Exhibit 1).

101. Ms. Jubert will assume the full-time position of Operations Manager of the proposed radio station facility. She will also chair the Personnel Committee and serve as a member of the three remaining policy committees. She will devote at least 40 hours a week to the operations of the station (Peoples Exhibit 2).

102. Daniel Cantor will be a member of each of the four policy committees. Initially, he will be involved in an intensive financial management and radio management training program under the direction of Joseph Cantor and Andrew Johnston, and he will be assigned to each department in the station. After the training period, Mr. Cantor will determine the areas of the station's operations to which he will commit his energies (Peoples Exhibit 3).

103. Andrew C. Johnston will be the full-time General Manager of Peoples and will directly supervise all operations of the proposed station under the guidance of the policy committees and will chair the Program Policy and Operations Committees (Peoples Exhibit 6).

104. Joseph Cantor is a 52% stockholder in the Lafayette Road Corporation, which owns *de minimis* amounts of stock[20] in four

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[18] Program, Personnel, Finance and Operations.

[19] Program, News, Sales and Operations.

[20] Lafayette owns .0000562 of the outstanding shares of Schering-Plough, .0001266 of the outstanding shares of Time Incorporated, .0001134 of the outstanding shares of Warner Communications and .0004704 of the outstanding shares of American Family Corporation.

publicly-held corporations having broadcast or communications interests. Lafayette purchased these stocks for investment purposes only and has not exercised its voting rights in them (Peoples Exhibit 9).

105. Daniel Cantor owns 48% of the stock in Lafayette Road Corporation. He also personally owns 200 shares or .000037 of the outstanding shares of Schering-Plough (Peoples Exhibit 10).

106. Neither Ms. Jubert nor Mr. Johnston has broadcast or communications interests (Peoples Exhibits 2 and 6).

107. Peoples will install standby generators at both the transmitter and studio sites. In addition, it will purchase a standby transmitter which will allow Peoples to continue operation if the main transmitter malfunctions or is shut down for maintenance (Peoples Exhibit 7).

108. The past broadcast record of Mr. Johnston was considered in this proceeding. Mr. Johnston was a 7% owner, Treasurer and Director of Frank Perry Lloyd & Associates, Inc. (FPL&A), the licensee of Station WTLC-FM at Indianapolis, Indiana. He served in this capacity from February, 1973 until September 1, 1976 and Johnston was the General Manager of the station from February, 1974 until September 1, 1976 (Peoples Exhibit 6). Mr. Johnston and FPL&A established certain long-term goals for WTLC which were to: (a) improve the air quality of WTLC to the most professional level in Indianapolis; (b) increase the quality of news from rip and read to professional news coverage; (c) implement investigative reporting of news that particularly affected the black community in Indianapolis; (d) improve the quality and the effectiveness of public affairs and public service programming; (e) train a professional and competent sales force; (f) increase the quality of the advertisers and (g) generate sufficient revenue to increase the overall quality of the broadcast product provided (Peoples Exhibit 6, pp. 6–7). A comparison was made between WTLC and other Indianapolis stations based on renewal applications filed in 1976 and this shows that WTLC exceeded other FM stations in the market in the areas of public service announcements, news, other non-entertainment programming including public affairs and total non-entertainment programming by averages ranging from 30% to 268% (Peoples Exhibit 6, pp. 7–8). As General Manager of WTLC, Mr. Johnston implemented an internship program involving eight students of which seven were Black and 3 were female (Peoples Exhibit 6, p. 22). It is represented that the revenues increased from about $400,000 in 1972 to over $800,000 in 1976 and during this period, no dividends or director's fees were paid. Rather, such revenues were used to finance various capital improvements (Peoples Exhibit 6, pp. 22–23). WTLC also received an award each year from 1974 to 1976 (Peoples Exhibit 6, p. 13).

109. The record also shows that WTLC was cited for three lottery

violations in July and November, 1973 and February 6, 1974 in violation of Section 1304 of Title 18 U. S. Code. The Commission took no formal action on this matter because more than a year had passed since the violations. The Commission advised WTLC that steps would have to be taken to prevent such violations in the future and that these violations would become part of the record for Station WTLC (RCI Exhibit 1).

110. WTLC was found in violation of Section 73.265(a) of the Rules for not having a licensed operator in charge of the transmitting system for 93 hours during June, 1974. A forfeiture of $500 was assessed for this violation (RCI Exhibit 2).

111. WTLC was also found to be in violation of Section 73.252(a) of the Rules between May, 1974 through January, 1975; in violation of 73.297(b) of the Rules (failure to measure stereophonic pilot subcarrier) and inviolation of Section 73.961(c) of the Rules (failure to conduct monitor tests of the Emergency Broadcast System). No further action was taken by the Commission on those violations upon receipt of an explanation of steps to avoid future violations from WTLC (RCI Exhibit 2).

112. The total amount of news, public affairs and other nonentertainment programming broadcast by WTLC during the 1976 license renewal composite week closely approximated the performance proposed in the prior renewal application (20.7% of all programming versus 20.0% of all programming (RCI Exhibit 5, pp. 1–4)).

Radio Circle City, Incorporated (RCCI)

113. RCCI is an Indiana corporation with eight shareholders. Robert D. Kiley holds or has subscribed to 61.11[21] of the shares of stock; Clarence H. Doninger 5.55%; Vern R. Young 5.55%; Hallie Bryant 5.55%; Phillipa Wyatt 5.55%; Roger W. Kiley 5%; Reuben Lipman 5% and Sam H. Jones 5% (RCCI Exhibit 1).

114. Robert Kiley, President and Director of RCCI and 61.11% stockholder, was born and educated in Indianapolis and has resided his entire life there. He attended local Indianapolis schools and Butler and Indiana Universities and the Indiana University Extension in Indianapolis (RCCI Exhibit 2).

115. Mr. Kiley became involved in commercial broadcasting in 1959 when he joined radio stations WISH(AM) and (FM) in Indianapolis, Indiana,[22] as an Account Executive. In 1964, he was named Sales Manager of the stations and he became General Manager in

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[21] RCCI sought to amend its application which would have reduced Kiley's interest to 55% while increasing the ownership interests of certain Blacks and women. This amendment was denied by Order released March 9, 1979 (FCC 79M–330).

[22] Call letters were changed to WIFE(AM) and (FM) when the stations were sold to Star Stations, Inc. in 1963.

1965. He was named Vice-President in 1967 and President in 1970, and in 1972, he acquired a 1.5% interest in the parent company. In 1976, Kiley sold his stock back to Star Stations for the same price that he paid for it, and presently has no interest in Star Stations, Inc. or any business connection with Don W. Burden.[23] Since 1976, Kiley has been employed at an advertising agency, Kiley, Miller and Bain, Inc. in Indianapolis (RCCI Exhibit 2, pp. 2–3). Kiley, Miller and Bain, Inc. was formed by Kiley's uncle and is among the 15 to 20 largest advertising agencies in Indianapolis (Tr. 2473) with gross billings of approximately $4 million a year (RCCI Exhibit 1, p. 7). The uncle, who is semi-retired, is currently selling one-half of his interest to Roger Kiley (Tr. 2472). Roger Kiley is a 5.55% owner of RCCI and a brother of Robert Kiley (RCCI Exhibit 1). Robert Kiley and RCCI represent that upon the grant of RCCI's application, Robert Kiley will sever all ties with Kiley, Miller and Bain, Inc. (RCCI Exhibit 1, p. 7).

116. From 1967 to 1977, Mr. Kiley served on the Board of Directors and the Public Relations Committee of the local American Red Cross. He was also on the Board of Directors as well as serving as Vice-President of "The 500" Festival Associates from 1969 to 1973 and was elected a member of the Board of Directors of the Better Business Bureau from 1973 to 1976. In addition, he was Chairman of the Advertising Committee of the Mayor's Communications Task Force and served on the Drug Abuse Task Force of the Mayor; the Communications Committee of the Church Federation from 1968 to 1979; the National Alliance of Businessmen from 1966 to 1976; and the Education Committee of the Greater Indianapolis Progress Committee from 1969 to 1976. In 1979, Mr. Kiley became a volunteer consultant to the Director of the Indiana Area United Methodist Communicators and a layman Board member. From 1969 to 1976, Mr. Kiley organized and chaired approximately 100 meetings of the WIFE Community Advisory Board (RCCI Exhibit 2).

117. *Sam H. Jones*, a Director of RCCI and a 5% stockholder, is a Black male who has resided in Indianapolis since 1966. He is a graduate of Clark College, and holds master degrees from Atlanta University. In addition, Mr. Jones holds an honorary Doctor of Law degree from Vincennes University and an honorary Doctor of Humane Letters from Marion College. In 1959, he was named one of the ten outstanding young men by the Cleveland Junior Chamber of Commerce and received the Social Worker of the Year Award in March of 1969.

118. Mr. Jones has been Executive Director of the Indianapolis Urban League since 1966. In addition, he served on the Community Advisory Board of Station WIFE. Mr. Jones has a record as a substantial community leader in all phases of the religious and civic

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[23] Don W. Burden controlled Star Stations, Inc.

activities in Indianapolis, particularly in the Black community (RCCI Exhibit 8, Attachment B).

119. *Hallie Bryant*, Vice-President and a Director of RCCI and a 5.55% stockholder, is a Black male and has lived in Indianapolis continuously since 1943. Mr. Bryant played professional basketball. At the present time, he works for the Harlem Globetrotters approximately six months each year, and during the remainder of the year, puts on one-man basketball shows throughout the United States.

120. From 1970 to 1976, Mr. Bryant worked at radio station WIFE as a part-time sports director. Mr. Bryant has no record of active participation in civic affairs in Indianapolis other than he does put on one-man basketball shows for many civic organizations (RCCI Exhibits 1 and 10).

Integration

121. Mr. Kiley is the President and proposed General Manager of RCCI's station. He will work full-time and will be responsible to the Board of Directors for all aspects of the station's operation (RCCI Exhibit 1, p. 9). Mr. Jones' primary responsibility will be for the production of a 30-minute public affairs program "Urban Forum" which is proposed to be broadcast on Sundays at 9:00 A.M. and 10:00 P.M. Mr. Jones will be responsible for the selection of topics and participants. In addition, Mr. Jones will have the responsibility to consult with and aid Robert Kiley in the production of other local public affairs programs of the station, including editorials, particularly those dealing with the needs of Indianapolis' minority community. Mr. Jones' expertise will also be used in implementing the station's Equal Employment Opportunity Program and in meeting with community groups and ascertaining community problems. Mr. Jones will devote between five to ten hours a week to his activities at the station and to his duties as a member of the Board of Directors (RCCI Exhibit 1, p. 9).

122. Mr. Bryant will be Sports Director of the station on an irregular basis and will produce, direct and broadcast sports news items of a local, national and international nature. In addition, Mr. Bryant will also consult with and advise Robert Kiley on the needs of the minority community of Indianapolis, and on the implementation of the station's Equal Employment Opportunity Program. Mr. Bryant will devote on the average of approximately five to ten hours per week to these activities (RCCI Exhibit 1, p. 9).

123. None of the officers, directors or stockholders of RCCI nor the corporation has any interest in any AM, FM or TV broadcast station, construction permit or application for the same before the FCC (RCCI Exhibit 1, p. 3).

124. Hallie Bryant is a 60% partner and Clarence Doninger a 20% partner in H. Bryant Co., and through H. Bryant Co., hold a

1.8% and 0.6% interest, respectively, in Indianapolis Cablevision Co., Ltd., in which they are limited partners. Indianapolis Cablevision Co., Ltd. is the holder of franchise rights to develop, and is developing, CATV systems in the Marion County communities of Speedway, Beech Grove and Lawrence, Indiana. It also has franchise rights and plans to develop CATV services in those portions of Marion County outside the boundaries of the old City Limits of Indianapolis, Indiana.[24]

125. Neither H. Bryant Co. nor any of its three partners has any right to participate in the management, operation or control of the proposed CATV systems, nor do the limited partners of Indianapolis Cable Co., Ltd. have any right to participate in the management of the CATV company. Neither Mr. Bryant nor Mr. Doninger have been asked, nor will they serve in any way on the Executive Committee of Indianapolis Cable Co., Ltd., that will carry out the business of that partnership (RCCI Exhibit 1, pp. 3–4).

126. Roger W. Kiley, a 5% stockholder of RCCI is President and 22% stockholder of Kiley, Miller and Bain, Inc. Phillipa Wyatt, a 5.55% stockholder of RCCI and a Director, is sole owner of Wyatt Advertising, Inc.[25] (RCCI Exhibit 1).

127. Robert Kiley is now a full-time employee of Kiley, Miller and Bain, Inc. He has no ownership interest in the agency and has no official position with the agency, other than as an employee. IF RCCI receives the permit, Robert Kiley will sever all ties with Kiley, Miller and Bain, Inc. (RCCI Exhibit 1).

128. RCCI will institute certain policies and practices should it be the successful applicant with respect to advertising agencies. This matter arises because Robert Kiley presently works for the Kiley, Miller and Bain, Inc. advertising agency and Roger (Kiley's brother) is President and 22% stockholder of the advertising agency and a 5.55% stockholder of RCCI. Phillipa Wyatt, another 5.55% stockholder of RCCI is the sole owner of Wyatt Advertising, Inc., an Indianapolis advertising agency.

129. There are about 100 advertising agencies in Indianapolis with gross billings for all media of approximately $180 million. The gross billing for the AM-FM radio media in Indianapolis, according to FCC reports for 1975 through 1977, ranged from approximately $9.5 million to $11.3 million. The Kiley, Miller and Bain, Inc. advertising agency's gross billings are about $400,000 per year and the Wyatt advertising agency billings have not exceeded $150,000 in the last three fiscal years.

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[24] Hallie Bryant and Clarence H. Doninger each hold 5.55% of the stock in RCCI. Doninger is not proposed to be integrated into the management and operation of the proposed RCCI station.

[25] Even her duties as a Director of RCCI will be somewhat limited since her primary occupation will be to continue her Indianapolis advertising business.

130. RCCI's practices in dealing with advertising agencies and commercial accounts which desire to place advertising on the proposed FM stations are as follows:

(1) No advertiser will be required to use an advertising agency to place business on the station.

(2) No advertiser will receive any preferential treatment should they use the Kiley or Wyatt advertising agencies.

(3) No stockholder, officer or director of RCCI who has an interest in an advertising agency will be provided any information with respect to the station's commercial practices that is not provided in the same basis to all advertising agencies.

(4) Both Roger Kiley and Phillipa Wyatt will be required to disclose to their clients, the ownership connection with RCCI and both Kiley and Wyatt have agreed that they will make no representation, express or implied, that they have any special access to the station not available to other advertising agencies.

(5) RCCI will institute a non-discriminating policy with respect to all employees of RCCI who deal with advertising agencies, and, in particular afford no preference to either the Kiley or Wyatt agencies.

(6) Both Kiley, Miller and Bain and Wyatt advertising have agreed that so long as Roger Kiley and Wyatt are stockholders of RCCI, the agencies will not represent any other AM or FM station serving the Indianapolis market. This is to prevent either agency from obtaining confidential information about competition of RCCI. (RCCI Exhibit 1, pp. 7–8)

RCCI will purchase and install for its proposed station an emergency standby power generator designed to enable the station to continue broadcasting in case of a power failure of conventional commercial power sources. RCCI proposes to utilize a KVA generator, with 45 kw of diesel power (RCCI Exhibit 1, p. 3).

Mediacom

131. Mediacom is an Indiana corporation with 88 shares of common stock issued and outstanding. Its eight shareholders hold the number of shares and votes indicated below.[26]

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[26] The discrepancy between percentages of shares and voting rights is due to the fact that Messrs. Kuhn, Bradley, Lamb and Poole each assigned the voting rights to one share each to Messrs. Weir, Sweet, Bernard and Ms. Mandich; Mr. Sweet assigned voting rights to one share each to Messrs. Weir and Bernard and to Ms. Mandich, by means of irrevocable proxies executed September 15, 1978. In the event that the proxy is terminated (for enumerated reasons, all of which would be beyond the control of the beneficial owner of the subject share), then additional proxies will be issued so as to maintain the distribution of voting control of the

Name	*Shares*	*Votes*	*Aggregate Investment*
James E. Weir	15 (17.05%)	20 (22.73%)	$ 3,000
George P. Sweet	15 (17.05%)	16 (18.18%)	26,200
Heidi E. Mandich	5 (5.68%)	10 (11.36%)	1,000
Robert H. Bernard	5 (5.68%)	10 (11.36%)	1,000
George A. Kuhn, Jr.	12 (13.64%)	8 (9.09%)	43,000
C. Harvey Bradley, Jr.	12 (13.64%)	8 (9.09%)	43,000
James E. Lamb	12 (13.64%)	8 (9.09%)	43,000
James S. Poole	12 (13.64%)	8 (9.09%)	43,000

All the stockholders are directors of the corporate applicant. James E. Weir is President and a member of the Board of Director's Executive Committee, George P. Sweet is Secretary-Treasurer and Heidi Mandich and Robert Bernard are Vice-Presidents. All officers listed, except Mr. Sweet proposed to work at the station on a full-time basis. Mr. Sweet will devote 20 hours a week to the operation on a day-to-day basis each week (Mediacom Exhibits 1–5).

132. It is proposed that the full-time shareholders for which integration is claimed (Weir, Bernard and Mandich) would have collectively 28.41% of Mediacom's stock for which they paid a total of $5,000 or 2% of the invested capital (Tr. 919–20). Mr. Sweet would devote 20 hours a week to the day-to-day operations. Under the proposal, the so-called lending shareholders (Kuhn, Bradley, Lamb and Poole), upon exercising the options granted to them pursuant to Loan and Option Agreement, would grant a proxy (irrevocable for a term expiring March 31, 1997) to one of the shareholders for whom integration is claimed. The net effect of this is that the voting power of full-time integrated stockholders Mandich and Bernard will increase from 5.68% for each to 11.36% for each. The voting rights of Weir is increased from 17.05% to 22.73% and Sweet's voting rights from 17.05% to 18.18%. The total effect of this is that the proposed full-time integrated stockholders of Mediacom would vote 42.45% (Mediacom Exhibit 1, p. 1). The so-called investing stockholder and Sweet control 54.54% plus five of the eight seats on the Board of Directors (Mediacom Exhibit 1; Tr. 925–26).

133. *James Weir* was born in Shelby County, Indiana and has resided in Indianapolis since 1967. He attended high school in Rush County, Indiana and earned a Bachelor of Fine Arts degree in Radio

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corporation between operating personnel and others at the present level.

and Television Education in 1965 from the University of Cincinnati, Cincinnati, Ohio.[27]

134. While still in college, Mr. Weir obtained his first position in broadcasting as a part-time employee in the Production Department of WLWD, Cincinnati and during his final year and a half worked full-time at the station. After graduation, he became an Assistant General Manager of Station WTRE(FM), Greensburg, Indiana in June, 1965 and, after a short time became General Manager. In February, 1966, he joined the sales staff of Station WLWD, Dayton, Ohio as Sales Service and Marketing Coordinator and in February, 1967 became an Account Executive. He subsequently joined the staff of WISH-TV, Indianapolis as an Account Executive, and remained in that position for three years. From September, 1970 until September, 1973, he was Regional Account Executive at Station WIBC, Indianapolis.

135. In September, 1973, Mr. Weir formed an advertising agency, Adlib, Incorporated. Initially, he was Treasurer, a Director and a one-third owner, but in April, 1976, became the 100% owner. Mr. Weir intends to dissolve Adlib and to sever all connections with the advertising agency prior to the time the new FM station proposed by Mediacom begins operation[28] (Mediacom Exhibit 12). Currently, Weir is the only employee of Adlib (Tr. 929).

136. In 1976, Mr. Weir served as President of the Decatur County Heart Fund. He is presently a member of the Indianapolis Advertising Club, the Indianapolis Council Parent Cooperative and the Pike Township Parent-Teachers Association. Mr. Weir is a former member of the Builders Association of Indianapolis. He also helped found the John Sam Anderson Scholarship Fund for the Rushville, Indiana consolidated school system and presently advises the organization on fund-raising activities.

137. Mr. Weir, Mediacom's Chief Administrative Officer, will serve as the station's General Manager on a full-time basis, with ultimate responsibility for all of the day-to-day operations of the station.

138. *Heidi E. Mandich* was born in Indianapolis and has resided there her entire life. She attended elementary school and high school in Indianapolis and graduated in June, 1974 from Butler University in Indianapolis with a major in Radio Television and with a minor in Advertising/Public Relations.[29]

139. While at Butler University, Ms. Mandich was active in

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[27] The sources of all proposed findings relating to Mr. Weir are Mediacon Exhibits 2 and 10 unless otherwise noted.

[28] The advertising accounts of Adlib, Inc., would be transferred to McQuade, Bloomhurst and Weir states he will receive no compensation for this and there is no financial renumeration due him from any other advertising agency.

[29] The sources of all proposed findings relating to Ms. Mandich are Mediacom Exhibits 4 and 10 unless otherwise noted.

various extracurricular activities, as well as at Station WAJC(FM), the 36kw Butler University radio station. She was Assistant Traffic Director, Traffic Director, Public Relations Director, Assistant News Director, Continuity Director and Concert Hall hostess. In the last position, she produced and programmed a two-hour daily show which featured classical music and composers. She also worked, during two summer vacations from college, as a member of the Traveling Information Center of the Indiana State Tourist Division, and in 1973 as a receptionist in an advertising agency and as a reporter and announcer in the News Department of radio station WFBM, Indianapolis. While still at Butler, she began working at Carlson & Company, Inc., a full service advertising agency as Assistant Media Director and after graduation, she continued to work for Carlson & Company, concentrating in the areas of production and public relations, with her main project creating television and newspaper spots for statewide political candidates. In September, 1974, she was hired by Adlib as a media buyer and in July, 1975, she was promoted to Media Director of Adlib, Inc. Ms. Mandich joined the sales staff of WISH-TV, Indianapolis as an Account Executive in December, 1975 and she continues to hold that position.

140. In 1969, Ms. Mandich received the Freedoms Foundation Honor Medal. From 1969 to 1973, she served on the Indiana Governor's Youth Council and was a delegate from the Council to the National White House Conference on Children in 1970 and regional delegate to the National Youth Council from 1972 to 1973. From 1971 to 1975, she was an advisor for Junior Achievement, serving as a member of the National Conference staff of Junior Achievement from 1970 to 1973, and since 1975, Ms. Mandich has been Center Manager of the organization. Ms. Mandich is also an active member, since 1971, in Women in Communications, having served on the Public Relations Seminar Committee in 1975 and as corresponding secretary from 1977 to 1978. She is presently a member or the Legislative Awareness Seminar Committee. She has also remained active in her college sorority serving as Day Chairperson in 1976 and as a member of the Public Relations Committee and Room Chairperson in 1977 and 1978. Since 1977, Ms. Mandich has served on the Board of Directors of Camp Fire Girls.

141. Ms. Mandich, the Vice-President of Mediacom, will serve as community Affairs Director on a full-time basis.[30] Her primary responsibility will be the planning and production of the station's information programming other than news. She will also supervise the station's ascertainment of community needs, the News Department personnel in producing five daily segments of the station's

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[30] The Mediacom integration proposal states Ms. Mandich will devote full-time as the Community Affairs Director (Mediacom Exhibit 10, p. 2). There is no evidence of record that she intends to resign her present position at WISH-TV should Mediacom be the successful applicant.

"Index" public affairs programs and the weekly "Index Magazine" program. She will also have primary responsibility for ensuring that the station's proposals for merit programming are complied with. Ms. Mandich will participate in station promotion and sales. In addition, she will host the daily "Index-Women's Viewpoint" program.

142. *Robert Henry Bernard*, a Vice-President of Mediacom, is a Black American. He was born in Indianapolis, attended elementary school there and graduated from Arsenal Technical High School in Indianapolis.

143. After graduating from college, Mr. Bernard pursued an entertainment career while working at Buehler Corporation, the Chrysler Corporation, Eli Lilly & Company and the Bryant Corporation. He began working as an Account Executive at WTLC(FM), Indianapolis in 1969, and in 1971 assumed the same position at WIFE, Indianapolis. After eight months, he returned to WTLC as a Sales Manager and in January, 1973, he became an Account Executive at WNAP, Indianapolis and has held that position ever since.[31]

144. Since March, 1976, Mr. Bernard has been a member of Big Brothers of Greater Indianapolis. From 1971 to the present, he has been active with the Indiana Black Expo, Inc. In addition, he has been a member of the National Association for the Advancement of Colored People since 1972. From 1966 to 1973, he was a member of the Southern Christian Leadership Conference and from 1970 to 1974, he was a member of the now-defunct Indiana Black Caucus. He is also a member of the Indianapolis Mayor's Black History Committee. He has been a volunteer worker for the Democratic Party and served as a delegate to the State Democratic Convention in 1968. From 1975 to 1977, he served as part-time staff member of Andy Jacobs, Jr., representative from the 11th District of Indianapolis and was a delegate to the National Black Political Convention held in Gary, Indiana in 1972 and Cincinnati, Ohio in 1974.

145. Mr. Bernard received the first Annual Black Expo President's Award in 1975, and in 1978 the Annual Wes Montgomery Award from the City of Indianapolis. In 1978, he was included in Who's Who Among Black Americans. Mr. Bernard is a member of Greater St. Mark Baptist Church.

146. Mr. Bernard, a Vice-President of Mediacom, will serve as Sales Manager on a full-time basis. In addition, he will work with Ms. Mandich in planning public affairs programming in order to ensure that the needs and problems of the Indianapolis Black community are adequately represented. In addition, he will assume primary responsibility for ascertaining the needs and problems of

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[31] The sources of all proposed findings relating to Mr. Bernard are Mediacom Exhibits 5 and 10 unless otherwise noted.

the area's Black community, representing the station in dealing with various groups within that community. He will also share with Mr. Weir the responsibility of auditing the station's compliance with the Commission's Equal Employment Opportunity policies.

147. *George P. Sweet* was born in Indianapolis and attended elementary school and high school there. In 1964, he received a Bachelor of Arts degree in Science and Industrial Management from Purdue University, Lafayette, Indiana. While in college, he was active in various extracurricular activities and upon graduation from Purdue, was commissioned as a Second Lieutenant in the United States Army. After his discharge from the Army, Mr. Sweet developed and built tract housing in Chicago for a Lafayette, Indiana corporation. In April, 1967, he returned to Indianapolis as Personnel Director for an architectural engineering firm and in 1968, moved to Hawaii. He returned to Indianapolis in March, 1969 and since that time has been involved in real estate development projects. He formed his own construction management company in 1976, Sweet & Company, Inc., of which he is President and 100% owner, which is engaged in building homes in the Indianapolis area. He devotes 40 hours a week to this company (Tr. 958). He is also President, Director and Chief Executive Officer of Brenwick Development Company, which is presently engaged in developing residential subdivisions in the Indianapolis suburbs; a 50% general partner in Crooked Stick Realty Company, a holding company which develops custom homes in Carmel, Indiana; a 50% general partner in the Seventy-first and Dean Road Company, an Indianapolis land development company and a 10.25% general partner in Mohawk Crossing, Limited, developer of a 172 lot subdivision in Carmel, Indiana. In the past, he has been involved in another development company operating in Indianapolis and from April, 1967 until April, 1976, he served as Executive Vice-President of A & E Realty Company, a real estate brokerage firm located in Indianapolis.[32] He states his hours "are not 8:00 to 5:00. They are whatever I want them to be" (Tr. 983).

148. Since 1973, Mr. Sweet has been an active member of the Builders Association of Greater Indianapolis, serving in 1978 as its President. He spent approximately 15 hours a week on duties associated with that position. He has also been a member of the Board of Directors of the Indiana Home Builders Association since 1977. Mr. Sweet is a member of St. Luke's United Methodist Church and the University Club of Indianapolis.

149. Mr. Sweet, Secretary-Treasurer and Chairman of the Board of Directors of Mediacom, proposes to devote a minimum of 20 hours a week to the station, concentrating in the areas of financial management, community relations and special programming. In

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[32] The sources of all proposed findings relating to Mr. Sweet are Mediacom Exhibits 3 and 10 unless otherwise noted.

order to meet this commitment to Mediacom, Mr. Sweet indicates that he will reduce the approximately 40 hours a week he presently devotes to the affairs of his company, Sweet & Company, Inc. Mr. Sweet states that his building business will be economically viable if the number of homes built are substantially reduced and Sweet has discussed this option with his staff (Tr. 982–83, 989–91, 994).

150. *George A. Kuhn, Jr.*, is a Director and stockholder of Mediacom. Mr. Kuhn was born in Indianapolis and has been a resident of Indianapolis his entire life except for time at college and in the military service. He attended primary school and secondary school in the Indianapolis area and graduated from Harvard College, Cambridge, Massachusetts, with a Bachelor of Science degree with a major in Economics. He also earned a MBA degree from Harvard.[33]

151. Since the Spring of 1947, Mr. Kuhn has been associated with Klein & Kuhn, a partnership engaged in real estate management, commercial and industrial real estate brokerage and appraising. He is currently Executive Vice-President of the firm.

152. Mr. Kuhn has served as Director of the Indianapolis Water Company since 1973, a member of its Executive Committee since 1977, and as a member of a special committee of the Board for Real Estate Negotiations since 1978. He has been a Director of the American United Life Insurance Company since 1966. He has also been a Director of Guaranty Auto Stores since 1963 and an Officer and Director of numerous companies engaged in the ownership and operation of downtown office buildings from 1948 to the present. Mr. Kuhn was a Director of the American Fletcher National Bank & Trust Company from 1961 to 1973, and a Director of the American Fletcher Corporation from 1968 to 1973.

153. Mr. Kuhn has been an active member of the Society of Industrial Realtors of the National Association of Realtors, the Indianapolis Chamber of Commerce, the Indianapolis Civic Progress Association, the Executive Committee for the Commission for Downtown, Inc., the Mayor's Greater Indianapolis Progress Committee, the Indianapolis Corporate Community Council, the Concorde Center, the Indianapolis Hospital Development Association, the Wright Institute of Otology, the Indianapolis Community Chest - United Way, and Civic Center's Donor's, Inc. In addition, he has been active in the administration and fund-raising activities for the Tudor Hall School and its successor, Park Tudor School, and served as trustee, as well as a member of the Finance and Budget and Buildings and Grounds Committees of Butler University, Indianapolis. In addition, Mr. Kuhn is a Director of the Indiana Repertory Theatre, a member of the Advisory Council of the Christian Theological Seminary and a Director of Cathedral Arts.

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[33] The source of the proposed findings relating to Mr. Kuhn is Mediacom Exhibit 6 unless otherwise noted.

154. *C. Harvey Bradley, Jr.*, a Director and stockholder of Mediacom, was born in Indianapolis. He attended primary and secondary schools in Indianapolis and Andover, Massachussetts and received his college education and a Bachelor of Law degree from Yale University.[34]

155. After completing his studies, Mr. Bradley joined an Indianapolis law firm and became a partner in 1950. He joined the legal department of Eli Lilly & Company in 1960 and since then has served as Secretary, General Counsel and Director of Eli Lilly & Company. He also serves as Director of IVAC Corporation and Cardiac Pacemakers, Inc., which are subsidiaries of Eli Lilly & Company. In addition, he has served as a member of the Management Board of Elanco Products Company since 1964, and since 1973, he has served on the Board of Incorporators, Crown Hill Cemetery and Mausoleum. Since 1975, Mr. Bradley has served on the Board of Directors of the Indianapolis Water Company (Mediacom Exhibit 13).

156. Mr. Bradley has been a member of the Indianapolis Bar Association since 1949 and a member of the Indianapolis Lawyers Club since 1955. He has also been a member of the American Society of Corporate Secretaries, Inc. since 1964 and since 1974, a member of the Association of General Counsel. Since 1972, he has been a member of the Indiana Supreme Court Committee on Character and Fitness and in 1977, he was appointed by the Chief Justice to be a member of the Citizens Advisory Committee on the Indiana Judiciary. In addition, he has held executive positions with the following organizations: Legal Aid Society of Indianapolis; Pharmaceutical Manufacturers Association and the Indiana Bar Association.

157. Mr. Bradley is also a member of the Indianapolis Athletic Club, the University Club and the Meridian Hills Country Club. He has served as Secretary to the Board of Trustees of the Tudor-Hall School, Director of the Crooked Stick Golf Club, and as President of the Dramatic Club of Indianapolis. He was also a member of the Allocation Committee of the Indianapolis United Fund from 1963 to 1965 and in 1974, he received a conservation award from the Boone County Soil Conservation Service.

158. *James E. Lamb* is a Director and stockholder of Mediacom, Inc. He was born in Lafayette, Indiana and attended elementary school, high school and college in Lafayette.[35]

159. While in college, Mr. Lamb was employed as a Sports Announcer at Station WAZY, Lafayette and later worked as a Sports Announcer for a local television station. His principal occupation

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[34] The source of all proposed findings relating to Mr. Bradley is Mediacom Exhibit 7 unless otherwise noted.

[35] The source of all proposed findings relating to Mr. Lamb is Mediacom Exhibit 8 unless otherwise noted.

has been as owner, Director and President of a beverage distributing company. He visits Indianapolis and outlying communities in connection with his beverage distribution business.

160. Mr. Lamb worked for several years on the United Way Campaign in Lafayette and for two years performed work in connection with the Mental Health Association Fund Raising Drive. In addition, he has been associated with a fund-raising drive for St. Elizabeth's Hospital for approximately 12 years and for three years has been a member of Big Brothers of Greater Indianapolis. He participated in the March of Dimes Campaign in 1975 and 1976 and has been a member of the Knights of Columbus for 20 years and of the Elks Club for 15 years. In addition, he is a member of the Central Catholic High School Athletic Association and the Alumni Association of Central Catholic High School, the YMCA and the Chamber of Commerce of Lafayette.

161. *James S. Poole* is a Director and stockholder of Mediacom. He was born in Indianapolis on September 15, 1940, and attended elementary school and high school in Indianapolis. He graduated with a B.A. degree from Purdue University, Lafayette, Indiana.[36]

162. In January, 1963, Mr. Poole joined National Homes Corporation as a Standards Department employee and subsequently became District Sales Manager and Regional Sales Manager. He began working in sales for a real estate and home/apartment construction firm in 1968 and since 1978, has served as Vice-President of Administration.

163. Mr. Poole is Secretary and a member of the Board of Directors of the Builders Association of Greater Indianapolis, and is on the Board of Directors of the Indiana Association of Realtors. He has been a member of the Metropolitan Indianapolis Board of Realtors since 1968 and an active member of Rotary International since 1973. He is on the Board of Directors of Big Brothers of Greater Indianapolis and is active in a junior (6–8 years old) baseball league. In addition, Mr. Poole has been associated with the fund-raising drive of the United Way of Greater Indianapolis, the Indianapolis Museum of Art and an Indianapolis non-commercial television station. He is also a member of the North Side YMCA, the Crooked Stick Golf Club and the John Purdue Club. He has been an active member of St. Paul's Episcopal Church, Indianapolis since 1953.

164. Messrs. Kuhn, Bradley, Lamb and Poole will not devote any specific amount of time to the proposed station on a day-to-day basis. However, they will participate regularly in the Board of Director's Meetings. In addition, they will also participate in the ascertainment of community needs and problems and discuss with Ms. Mandich

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[36] The source of all proposed findings relating to Mr. Poole is Mediacom Exhibit 9 unless otherwise noted.

ideas for programming to treat those needs and problems (Mediacom Exhibit 10, pp. 4–5).

165. Mediacom proposes to purchase and have available for operation an emergency generator which will enable the station to continue operation in the event of a failure of its regular power source (Mediacom Exhibit 11).

Radio Corporation of Indiana (RCI)

166. RCI is an Indiana corporation. It has six stockholders, all of whom are Directors. They are as follows: Michael Lee Gradison who holds 51% of the stock; Marvin James Frank, 20% of the stock and Rozelle Boyd, Estelle Nelson, Charles J. Berling, Jr., and Fay H. Williams, 7.25% each. Mr. Gradison will serve as Chairman of the Board, President and General Manager; Mr. Frank, Vice-President; Mr. Boyd, Secretary and Ms. Nelson, Treasurer. All of the shareholders are Directors of the corporation (RCI Exhibit 5). Of all the stockholders, only Mr. Gradison proposes to devote full-time to the operation of the proposed radio station (RCI Exhibit 9, p. 20).

167. *Michael Gradison* was born in Indianapolis and has been virtually a lifelong resident of the community. He attended schools in Indianapolis and Lake Worth, Florida and Brown University in Providence, Rhode Island from 1960 to 1964. He received a Bachelor of Arts degree from Brown in 1964 and completed one year of law school at the Indiana University School of Law, Bloomington, Indiana (RCI Exhibit 9).

168. While a student at Brown (1960–1964), Mr. Gradison served on the staff of radio station WBRU, owned and operated by undergraduate students. Mr. Gradison served in administrative capacities and also performed on-the-air work as an announcer on recorded music programs, news reporter, sports reporter, play-by-play announcer and moderator of public affairs programming, spending an average, during the four-year period, of 10 to 12 hours a week at station WBRU, with an average of three to four hours a week performing on-the-air. In addition, he was active in the sale of advertising, wrote copy for commercials, produced commercial spot announcements and dealt with customers.

169. While at Brown, Mr. Gradison participated in negotiations with the University to obtain a loan to finance the purchase of a Class B commercial FM station in Providence to be operated as a student-owned and controlled facility, and in negotiations with the owner of the station regarding the terms of the sale. He also conducted a survey of members of the public and prepared the demographic details for use in seeking FCC approval (RCI Exhibit 9).

170. Mr. Gradison began working for the family business, the Tri-State Construction Co., Inc. at the age of 12. Following his service in the U.S. Army, Gradison was employed with Concrete Corporation of Indiana for a period of eight years, from 1968 until the business

was sold in 1976, serving as General Manager from 1971 to 1976. Since the sale of the concrete business in April, 1976, Mr. Gradison has been involved in real estate ventures in Indianapolis and Louisville, Kentucky. In addition, he is a 25% participant in a joint venture, Bel Air/Gradison Productions, which is engaged in the production of a motion picture, and Vice-President, Director and 25% shareholder in Village Records, Inc., which produces records that are marketed and distributed by Mercury Records, Inc. It will be the policy of the station not to air any records of Village Records, Inc., unless and until the station's program Director establishes that the selection of such record for air play is supported by objective independent evidence such as popularity listings in Billboard Magazine (RCI Exhibit 9; Peoples Exhibit 8, pp. 38, 127; Tr. 1177, 1192–93). Village Records produces phonograph records of two groups "Roadmaster" and "Faith Band" (Tr. 1177). Both are based in Indianapolis, give concerts in Indianapolis and their records are sold in Indianapolis (Tr. 1045–46). Mr. Gradison also had an interest in We'll Manage, Thank You, Inc., which represented two artists and Consolidated Productions, Inc., which provided transportation and other services for touring music performance groups.

171. Mr. Gradison has testified that with respect to his real estate interests located in Indianapolis and Louisville, the day-to-day responsibility for the construction and on-going management of the property is and will be vested in Mr. Gradison's partner - Mr. Berling - whose full-time occupation and means of livelihood is real estate and property management (Peoples Exhibit 8, pp. 17–20, 123; RCI Exhibit 6). At the present time, Mr. Gradison does devote some amount of time to the real estate ventures, but states that he has cleared with the conventurers his plans to devote full-time as General Manager of RCI's proposed radio station (Peoples Exhibit 8, pp. 19–20, 23; Tr. 1211–14). Mr. Gradison also has some residential properties and tracts of land jointly owned with his father, who is 77 years old. These properties are attended to by a long-time employee, Mr. Rackley and thus Mr. Gradison states he will not be required to spend appreciable amounts of time on this project (Peoples Exhibit 8, pp. 10–15). The Village Records, Inc. is another of Gradison's business ventures which Gradison states involves little of his time since this business is attended to on a day-to-day basis by two other persons - Mr. Halderman and Mr. Barnes - and the company's product is distributed by Mercury Records.

172. Mr. Gradison is associated with Mr. Herbert Simon in the California-based ventures Consolidated Productions, Inc., We'll Manage, Thank You, Inc. and Bel Air/Gradison Productions - all of which Gradison states he has withdrawn from except the discharge of bank obligations. Mr. Simon has a 22.32% ownership interest and is a Director and Vice-President of Station WIFE-AM at Indianapolis plus other broadcast interests. The only business which continues to

operate is Village Records, Inc. Mr. Gradison has testified that he is not active in Village Records, Inc. and he does not share offices or other common ties with Mr. Simon and does not plan any future investments with Mr. Simon (Tr. 1146–47). Further, at one time, Mr. Simon and Mr. Gradison had participated in filing separate mutually-exclusive applications for the instant FM frequency (Tr. 1147–48, 1154).

173. The matter of the business relationship between Messrs. Gradison and Simon was raised in this proceeding in view of an effort of the other applicants to attribute Mr. Simon's broadcast interests to Mr. Gradison. It was ruled that this matter could not be explored absent a threshold showing that warrented considering the Simon's broadcast interests to Gradison under the "diversity" factor. The ruling was that such showing had not been made (Tr. 1171–72).

174. Mr. Gradison has been active in the Indiana Civil Liberties Union, serving as a member of the Board of Directors and the Executive Committee from 1969 to 1977, Treasurer from 1970 to 1972, Vice-President from 1972 to 1976, and President for a term in 1977. In addition, he has been active with the American Civil Liberties Union since 1976, serving in an unofficial liaison capacity between the ICLU and the national office of the ACLU in Washington, D. C. Since 1979, he has been a member of the Advisory Commission on National Security of the ACLU. Mr. Gradison has also been active in Community Action Against Poverty of Greater Indianapolis, Inc. (CAAP), serving since 1974 as a member of the Board of Directors, the Program Review Committee and the Executive Committee. He is currently Treasurer, Chairman of the Finance Committee and a member of the Public Media Committee (RCI Exhibit 9).

175. In addition, Mr. Gradison has served since 1977 on the Board of Directors of the Marion County Health and Hospital Corporation-Advisory Council and since 1976, has been active in the Indiana Repertory Theatre. He is also a member of the National Committee for an Effective Congress. Between September, 1975 and April, 1976, he was active in the Bayh for President Campaign Committee and in 1976 and 1978 in the election campaigns of Congressman Evans. Since 1975 he has served as a member of the National Finance Council of the Democratic National Committee (RCI Exhibit 9).

176. Mr. Gradison is a member of the Indianapolis Jewish Community Relations Council, the Board of Governors of the Jewish Welfare Federation, the Indiana State Symphony Society and the Indianapolis Zoological Society (RCI Exhibit 9).

177. In 1975, Mr. Gradison received the Robert G. Risk Distinguished Service Award from the ICLU and has been granted an honorary life membership in the American Civil Liberties Union.

Mr. Gradison received a Certificate of Appreciation from CAAP in 1977 (RCI Exhibit 9).

178. Mr. Gradison proposes to serve full-time as President and General Manager of RCI's new FM station.

179. *Charles J. Berling, Jr.*, a 7.25% stockholder and Director of RCI was born in Indianapolis and lived there until the age of 10. He returned to Indianapolis in 1965 and continues to reside there. He attended public schools in Indianapolis, Tacoma, Washington and Garden Grove, California. He graduated from Princeton University in 1965 with a Bachelor of Arts degree in Religion.

180. In 1965, Berling joined the construction company owned by his father and for the next five years served as Assistant Secretary-Treasurer, Secretary-Treasurer and General Manager. In approximately 1970, he became President of Racquet Clubs of America and during the next two years developed eight indoor tennis clubs. Mr. Berling started his own company, Controlled Development & Building Company, in 1972 which specializes in building and developing industrial and office building properties. In addition, Mr. Berling is a joint venturer and partner of Mr. Gradison in real estate interests in Indianapolis and Louisville, Kentucky. Mr. Berling will not be involved in the day-to-day operation of the proposed station.

181. Mr. Berling is an active member of the Second Christian Church in Indianapolis. From 1975 to 1976, he served as town trustee of Atlanta, Indiana, 25 miles from Indianapolis and as board member representing Atlanta on the Indiana Heartland Commission. In addition, he was program Coordinator at Marion County General Hospital in 1974–1975 and was involved in the Emergency Room program at the hospital. Since 1966, he has been a member of the Indiana Schools Committee for Princeton University.

182. *Rozelle Boyd*, a 7.25% stockholder and the Secretary and Director of RCI, a Black male, was born in Indianapolis in 1934 and has been a lifelong resident of the community. He attended Indianapolis public schools, Indiana Central College and Butler University in Indianapolis. He received a Bachelor of Arts degree from Butler in 1957 and a Master of Arts degree in United States History from Indiana University in 1965.

183. From 1957 until 1968, Mr. Boyd was a high school history teacher in Indianapolis and served for several years during this period as a counselor in the Adult Education Program. Since 1976, he has been an Associate Dean of the University Division of Indiana University at Bloomington. In addition, Boyd served as consulting editor for J. B. Lippincott Company in connection with a book published in 1973.

184. Mr. Boyd served from 1967 to 1975 as a member of the General Board and General Assembly of the National Council of Churches, elder in the Presbyterian Church and served on the Executive Board of the Indianapolis Presbytery and as a member of

the Indiana Interreligious Commission on Human Equality. Since 1973, he has been a member of the Board of the Community Action Against Poverty and from 1973 to 1977, he served as a member of the Board of the Marion County Association for Retarded Citizens. In addition, he is a member of the Board and President of the Regional Association and President of the Indiana Chapter of the Mid-America Association of Educational Opportunity Program Personnel, Vice-President of the Central Indiana Council for the Social Studies, Board Member of the Indiana Health Careers Commission, Board Member of the Academy in the Public Service, Board Member of the Indianapolis Federation of Associated Clubs, a member of the Greater Indianapolis Task Force on Inter-governmental Relations, member of the Employment and Income Security Committee and the Committee of Human Development of the National League of Cities, and a member of the State Implementation Plan Advisory Committee to the Metropolitan Development Commission.

185. Mr. Boyd was elected a member of the Marion County Council in 1965. In 1971, he served on the interim Marion County-Indianapolis City Combined Council and that same year, he was elected to the new "uni-government" Indianapolis City-County Council, and was reelected in 1975. Mr. Boyd served as minority leader of the Council from 1972 to 1976. Mr. Boyd was a democratic State Committeeman from 1972 to 1976, and Secretary of the Marion County Central Democratic Committee from 1972 to 1976. In 1972, he was a delegate to the Democratic Presidential Convention and a member of the Credentials Committee. Mr. Boyd has been active in the Indiana State Black Political Caucus since 1970 and from 1972 to 1975, he was Chairman of the Caucus. He is also a member of the Indiana Conference on Black Politics.

186. Mr. Boyd has received a number of awards. In 1966, he received the Man of the Year Award by the Iota Lambda Chapter of Alpha Phi Alpha, and in 1967 he received the Teachers Medal from the Freedoms Foundation, Valley Forge, Pennsylvania, for outstanding service as a public educator. He received the Citizen of the Year Award from the Zeta Phi Chapter of the Omega Psi Phi Fraternity in 1973 and in 1975, the Distinguished Alumnus Award and election to the Hall of Fame of Crispus Attucks High School. In 1978, he was named Educator of the Year by the Talent Search Program of the Association for Loan Free Education. In 1976, he received the Indianapolis Federation of Associated Clubs "Achievement Award" and the Outstanding Service Award from the Indiana Chapter of the Mid-America Association of Educational Opportunity Program Personnel. He received the Outstanding Service Award from the Marion County Association for Retarded Citizens in 1977 and in 1979, the first Annual Outstanding Achievement Award by the Indiana Christian Leadership Conference. Mr. Boyd will not participate in

the day-to-day management of the proposed station. The question of merit for Mr. Boyd's minority status will be considered *infra*.

187. *Marvin James Frank*, a 20% stockholder and a Vice-President and Director of RCI, was born in South Bend, Indiana. He has resided in Indianapolis since 1962. He is currently a practicing attorney and a certified public accountant.[37]

188. Mr. Frank attended primary and secondary public schools in South Bend, Indiana and attended Indiana University and the Indiana University School of Law in Bloomington, Indiana and in 1962, he transferred to Indiana University School of Law in Indianapolis from which he was graduated in 1966 with a degree of Doctor of Jurisprudence.

189. Mr. Frank has been active with the Big Brothers of Greater Indianapolis, Inc., and was instrumental in its founding in 1969 and served as its first President in 1970. He is still active in the organization. Mr. Frank was a member of the Board of Directors of the Indianapolis Jaycees for a number of years, and also served as legal counsel and chaired various projects, including a weekly program at the Marion County Juvenile Center. He has also been active in the Jewish Welfare Federation's annual fund-raising drives and has served on the Board of Directors of the Men's Club of Beth-El Zedeck Temple. In addition, he is Treasurer, member of the Board of Directors and member of the Executive Committee and other committees of the Hooverwood Indianapolis Jewish Home for the Aged, Inc. Mr. Frank is also a member of the Kiwanis Club of Indianapolis, the American and Indiana Bar Associations, the Estate Planning Council of Indianapolis and the Mid-West Pension Conference. Mr. Frank will not be involved in the day-to-day operation of the proposed station.

190. *Estelle Nelson*[38], a 7.25% stockholder and a Treasurer and Director of RCI, was born in Indianapolis and is a lifelong resident of the community. She attended primary and secondary schools in Indianapolis and attended the University of Miami, Coral Gables, Florida and Indiana University, Bloomington, Indiana. In 1967, she received a Master of Science degree in Education from Butler University.

191. She taught school for several years in the Indianapolis public school system.

192. Ms. Nelson is active in the National Council of Jewish Women and in the Jewish Welfare Federation. She is also an active member of the Jewish Educational Association and a member of the Hooverwood Guild of the Hooverwood Home for the Aged. In addition, she is a member of the following organizations: Sisterhood

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[37] All facts relative to Mr. Frank are based upon RCI Exhibits 8 and 15.

[38] Facts relative to Mrs. Nelson are based upon RCI Exhibits 10 and 15.

of the Indianapolis Hebrew Congregation, the Park-Tudor Mother's Association, the Parent-Teacher Association of Indianapolis Public School #84, Alliance for the Indianapolis Museum of Art, Hadassah, Organization of Rehabilitation Through Training, NAACP, Indianapolis Children's Museum, Arthritis Foundation, Arthritis Guild, National Audubon Society, Clowes Hall Women's Alliance, Indiana University Alumni Association and Kappa Delta Pi Honorary Society in Education. Ms. Nelson is also a member of the following professional organizations: the National Education Association, the Indiana State Teachers Association and the Indianapolis Education Association. Ms. Nelson will not take part in the day-to-day operation of the proposed station.

193. *Fay Helen Smith Williams*[39] a Black female,[40] and a 7.25% stockholder and a Director of RCI, was born in Galveston, Texas. She has been a resident of Indianapolis since 1955. She received her primary and secondary education in the Galveston public schools, and received a Bachelor of Arts degree from Texas Southern University, Houston, Texas in 1954. She was awarded a Master's degree in Social Case Work from Indiana University in 1958 and a degree of Doctor of Jurisprudence from Indiana University School of Law in Indianapolis in 1971.

194. Ms. Williams worked as a social worker for 10 years in the Indianapolis area. Since 1971, she has been engaged in the practice of law in Indianapolis and for the 1977 session of the Indiana General Assembly, served as Assistant Majority Counsel in the Indiana Senate. She also serves as a consultant to the Ford Foundation, Indiana Forum and the Indiana University.

195. Ms. Williams has been President of the Community Service Council of Greater Indianapolis since 1977 and a member of the Board of Directors since 1972. She has been Vice-President of the United Way of Indianapolis since 1976 and a member of the Long Range Planning Committee and the Executive Committee of the United Way. She has also been an active member, since 1973, of the Greater Indianapolis Progress Committee. In addition, she is an active member of the Indianapolis Urban League, the Indianapolis Chapter of the National Council of Negro Women and the Steering Committee of Leadership Development for Public Service. In the past, she has been a member of the following local civic activities: the Indianapolis Board of NAACP, the Camp Fire Girls, the Marion County Mental Health Association and the Indianapolis Symphony Orchestra.

196. On the national level, Ms. Williams is an active member of the National Municipal League, Common Cause, the League of

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[39] Facts relative to Ms. Williams are from RCI Exhibits 11 and 15.

[40] Ms. Williams' status as a minority will be considered *infra*.

Women Voters and Legis-50. In the past, she has been a member of the League of Women Voters of the United States, the Citizens Involvement Network and the American Friends Service Committee.

197. From 1964 to 1969, Ms. Williams participated in a weekly 30-minute public affairs program on radio station WGEE in Indianapolis. The program presented policy issues from the perspective of the Black community. Ms. Williams moderated the program and arranged for the appearances of all of the guests on the program. The series received an award in 1967 by the National Association of Broadcasters for being the best in its category. Ms. Williams chaired the Minority Advisory Council of station WRTV-TV, Indianapolis from 1973 to 1976.

198. Ms. Williams has received a number of awards. In 1965, she was awarded the Bronze Woman Award by a business women's association. She was named Citizen of the Year for 1967 by the Indianapolis Recorder, a local newspaper, and Woman of the Year by B'nai Brith in 1971. She received a Certificate of Appreciation from the Federation of Associated Clubs in 1972, the Mary McCloud Bethune Service Award in 1974 from the National Council of Negro Women, the Community Service Award from the YWCA in 1976, the Jefferson Award for Community Service by Indianapolis Newspapers, Inc. in 1978 and the Distinguished Citizen's Award of the National Municipal League in 1978.

199. Mr. Berling, Mr. Boyd, Mr. Frank, Ms. Nelson and Ms. Williams will listen to the station's programming and participate in the meetings of the Board of Directors which will include a regular agenda item to discuss the programming of the station. Although Mr. Gradison took the leadership role in preparing the application, Messrs. Berling, Boyd, Frank, Ms. Nelson and Ms. Williams participated in the preparation of the RCI application. They interviewed leaders of the community to ascertain their view of community needs, problems and interests and each of them participated in discussions of the Board of Directors at which RCI formulated the program proposals for the station (RCI Exhibit 6, pp. 6–7, RCI Exhibit 7, pp. 11–12, RCI Exhibit 8, pp. 6–7, RCI Exhibit 10, pp. 8–9 and RCI Exhibit 11, pp. 10–11).

Diversity of Ownership of Mass Media of Communications

200. None of the principals of RCI has an ownership interest, office or position with any broadcast company, broadcast station, cable television system or other medium of mass communication (RCI Exhibit 6, p. 6, RCI Exhibit 7, p. 11, RCI Exhibit 8, p. 6, RCI Exhibit 9, p. 19, RCI Exhibit 10, pp. 7–8, RCI Exhibit 11, p. 10; Tr. 600–01, 1003, 1004 *et seq*, 1021–22, 1171–72)

Auxiliary Power Equipment

201. RCI will acquire and install auxiliary power equipment (RCI Exhibit 5, p. 2).

Indianapolis Communications Corporation (ICC)

202. Indianapolis Communications Corporation (ICC) is an Indiana corporation with 1,000 shares of stock outstanding. The following individuals have subscribed to stock in the corporation in the percentages indicated below: Edward J. Zebrowski 14.8%, Leonard E. Walk 20.2%, Herbert Roller 13.1%, Ligon W. Drane 2.3%, John R. Nichols 14.8%, William M. Duchon 13.1%, Richard M. Malad 14.8% and Mary E. Busch 6.9%. In the event that ICC is the successful applicant, ICC, according to the terms of a February 23, 1977 agreement, will increase its authorized shares by 100 for the purpose of extending to Ray R. Gusky the option of purchasing the additional 100 shares. The exercise of an option will result in Mr. Gusky acquiring 9.09% of the stock, and will reduce the percentage of ownership of each present shareholder.[41] (ICC Exhibit 1; Tr. 661).

203. *Leonard E. Walk*, Vice-President and a Director of ICC and holder of the largest ownership interest in ICC, was born in Pittsburgh, Pennsylvania and continues to reside there. He attended local public schools in Pittsburgh and the University of Pittsburgh. He received a Bachelor of Arts degree in 1949, with a major in Economics (ICC Exhibit 2; Tr. 698). He is a resident of Pittsburgh, Pennsylvania and has been all of his life (Tr. 1231).

204. Mr. Walk, while still in high school, played records for an early background music service and assisted an independent recording studio in the production of radio commercials. During his tour of duty in the military service, he was assigned to the staff of the Armed Forces Radio Station in Tokyo where he worked for approximately a year, announcing and helping to produce programs, including interview and sports broadcasts. He returned to college to complete his studies and while still a student worked part-time as an announcer for station WHOD, Homestead, Pennsylvania (ICC Exhibit 2, p. 1). After graduation, he became a full-time staff member of station WHOD, working both as an announcer and salesman. He became Station Manager of WHOD in 1951. He was also employed during the early fifties, for approximately a year, by an independent

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[41] For the purpose of these findings, an assumption will be made that Mr. Gusky has exercised his option. Based on this assumption, the percentages of stock subscribed by other ICC principals is as follows: Edward J. Zebrowski 13.45%; Leonard E. Walk 18.36%; Herbert Roller 11.91%; Ligon W. Drane 2.09%; John R. Nichols 13.45%; William M. Duchon 11.91%; Richard M. Malad 13.45% and Mary E. Busch 6.27%.

producer to prepare the script and announce a daily local television news program. In 1956, Mr. Walk joined with two acquaintances[42] to purchase station WHOD and the station's call sign was subsequently changed to WAMO and reassigned to Pittsburgh. The owners, including Walk, subsequently placed in operation a companion FM station and disposed of both stations by assignment in 1973. In addition, they acquired the following additional stations and operated them until they were assigned: standard broadcast station WUFO, Amherst/Buffalo, New York, 1961–1973; standard broadcast station WILD, Boston, Massachusetts, 1966–1973; and standard broadcast station WLTO, Miami, Florida, 1965–1972. Mr. Walk was President and Chief Executive Officer of the parent corporation, Dynamic Broadcasting, Inc., and its subsidiaries, with the overall supervisory and corporate responsibility for the operation and management of all the stations (ICC Exhibit 2, p. 2).

205. Mr. Walk was also President, Director and 80% shareholder in West Coast Communications Corp., the licensee between 1967–1971 of standard broadcast station KKAR, Pomona, California (ICC Exhibit 2, p. 3).

206. Since the assignment of the WAMO stations in 1973, Walk has served as a broadcast consultant, spending an average of 15 hours a week on these activities. In addition, Mr. Walk is an investor in various real estate syndications and/or partnerships, but spends no more than five hours a week on activities connected with these real estate investments. Mr. Walk is also a 5% shareholder and Chairman of the Board of Directors of Dynamic Cablevision of Florida, Inc. As of the date of the hearing, the cable company had five miles of cable plant with 75 subscribers in Hialeah, Dade County, Florida. An additional 15 to 20 miles of plant are under construction, with an average density of approximately 100 subscribers per mile of cable. Mr. Walk has no other business or media ownership interests (ICC Exhibit 2, p. 3).

207. Mr. Walk, who intends to maintain his residence in Pittsburgh, proposes, during the first three months prior to sign-on of the station and the first three months of operation, to be in Indianapolis working on station business on a full-time, five day per week basis. During the next six months, Mr. Walk would be at the station on a full-time basis for at least 10 days each month, and would, though not in residence full-time, remain in contact with the full-time General Manager and other station personnel and receive daily and other reports as to all phases of station operation. Mr. Walk plans to devote an average of 20 hours a week to the station, including a minimum of three full days a month in Indianapolis, with the remainder of the time devoted to monitoring, review of

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[42] Dynamic Broadcasting, Inc., in which Walk was President, Director and 50% owner. The other two owners were Bernard Freidman and James Rich.

reports, and contacts with the General Manager and staff. In case of an emergency, Mr. Walk would be available and, if necessary, would spend additional time in Indianapolis (ICC Exhibit 2, pp. 4–5).

208. *Edward J. Zebrowski*, President and a Director of ICC, was born in New Britain, Connecticut, and attended elementary school and high school in the Detroit, Michigan area. He moved to Indianapolis in 1962 and continues to reside there.

209. Mr. Zebrowski has been a self-employed painting contractor, a drill press operator, a supervisor for an aircraft parts manufacturer and a real estate salesman and broker (ICC Exhibit 3; Tr. 707, 747).

210. In 1965, Mr. Zebrowski founded Zebrowski & Associates, Inc., a demolition company of which he is President, Director and sole shareholder. In addition, he has a 51% partnership interest in Zebrowski and Zebrowski, a real estate partnership and a 50% ownership interest in Paul's Trailer Service, Inc., which performs maintenance and repair work for commercial trailers (ICC Exhibit 3, p. 1).

211. Mr. Zebrowski devotes an average of 15 hours per week to his demolition company and approximately six hours per week on his real estate ventures (ICC Exhibit 3, p. 1).

212. Mr. Zebrowski is President of the Murat Temple of DeMolay Unit in Indianapolis and the Indiana DeMolay Foundation, Inc. He is also a member of the following community organizations: Oriental Masonic Lodge No. 500; All York Rite Bodies; Indianapolis Valley Scottish Rite; 33 Degree Mason; Murat Shrine, Murat Police Club; Murat Arab Patrol; Murat Shrine Club; Murat Gun Club; Murat Mini-Cycle Club; Kowad al'Sabikin; Royal Order of Jesters; Indianapolis Horse Patrol; Midwest Amputee Golf Association; Rotary Club of Indianapolis; Antelope Club; American Society of Safety Engineers; Indiana Sheriff's Association; Fraternal Order of Police; City of Indianapolis 300 Police Motorcycle Drill Team; Indianapolis Chamber of Commerce; Anglers Club and State Capitol Optimist Club (ICC Exhibit 3, pp. 2–3).

213. Mr. Zebrowski was past President of the Indiana Building Wreckers Association, past member of the Board of Directors of the National Association of Demolition Contractors, past member of City of Indianapolis Wrecking Board, Licensing Division, past Board member Rotary Club of Indianapolis, past President Antelope Club, past President Mid-west Amputee Golf Association and past President Indianapolis Horse Patrol (ICC Exhibit 3, p. 4).

214. Mr. Zebrowski, in 1970 and 1976, received the Sagamore of the Wabash Award from the Governor of Indiana for community service (ICC Exhibit 3, p. 4).

215. In the event that ICC receives the grant, Mr. Zebrowski plans to devote an average of 20 hours a week to the ICC station. Mr. Zebrowski would participate in the Financial Review Committee,

involve the station in the community through his contacts and involvement in civic organizations, secure community groups for public service programming and assist the sales department by contacting business acquaintances. Mr. Zebrowski's involvement in ICC's application has included participation in community leader surveys (ICC Exhibit 3, pp. 4–5; Tr. 747). He has no prior broadcast experience (ICC Exhibit 3). He has no present ownership interest in any medium of mass communication.

216. *John R. Nichols*, a Director of ICC but not an officer, was born in Owen County, Indiana. He attended public schools in Owen County and currently resides in Greenwood, Indiana, a suburb of Indianapolis (ICC Exhibit 4; Tr. 710, 748).

217. Mr. Nichols worked briefly for Eli Lilly & Co., and was self-employed in real estate, primarily residential, in Indianapolis. In 1955, he began working for Farm Fans, Inc. and in 1960 became a 50% owner. He presently serves as the Vice-President and Director of Farm Fans. He also has a one-third ownership interest and is Vice-President and Director of Southern Agriculture Wholesalers, Inc. in Moultrie, Georgia. Mr. Nichols spends approximately 25 to 30 hours a week on Farm Fans' business which employs over 300 employees. The amount of time devoted to Southern Agriculture Wholesalers, Inc. is limited to two-to-three day trips to Moultrie two or three times a year (ICC Exhibit 4, pp. 1–2).

218. Mr. Nichols is active in the Murat Shrine in Indianapolis and the Midwest Amputee Golf Association.

219. In the event that ICC receives the license, Mr. Nichols plans to devote an average of four to eight hours a week to the station and would be available each day if needed. His duties for ICC would include participation in the Financial Review Committee. Mr. Nichols aided in obtaining financing for the proposed station and participated in community leader surveys (ICC Exhibit 4, p. 3; Tr. 748).

220. Mr. Nichols has no present ownership in any medium of mass communications (ICC Exhibit 4, p. 3). No prior broadcast experience is shown.

221. *Herbert Roller*, Secretary and a Director of ICC, was born in Cleveland, Ohio, where he attended primary and secondary schools and Western Reserve University. In 1957, Mr. Roller moved to Indianapolis. He currently resides in Carmel, Indiana, a suburb of Indianapolis (ICC Exhibit 5; Tr. 711, 749).

222. Mr. Roller worked as a salesman for the May Company in Cleveland. He was self-employed as a distributor of auto parts in the Midwest and later held a franchise for distribution of furniture for infants in the Chicago care. For a year, he was a traveling salesman for Rosecrest Manufacturing. He is presently a sales representative for an apparel firm and devotes an average of 30 hours a week to servicing accounts in Indianapolis and a radius of 75 miles thereof.

In 1970, Mr. Roller, along with William Duchon, founded Lemon Tree Stores which is engaged in the retail sale of women's apparel. Mr. Roller is Executive Vice-President, Director and 22% owner, but is not involved in the day-to-day management of Lemon Tree's six stores. He does devote approximately five hours a week to conferences and discussions, primarily with Duchon, with respect to Lemon Tree business (ICC Exhibit 5, pp. 1–2).

223. Mr. Roller has received the Salesman of the Year Award and the Meyer Abrahams Award from his employer Bobbie Brooks and the Sales Marketing Associates, an organization of sales representatives of major corporations (ICC Exhibit 5, p. 3).

224. In the event that ICC receives a license, Roller will devote an overall yearly average of 20 hours a week to ICC's station (ICC Exhibit 5, p. 3; Tr. 749). Mr. Roller's activities on behalf of ICC would include participation in the Financial Review Committee. This estimate of time is based on larger amounts of time devoted to the station during the Bobbie Brooks off-season which consists of 16 weeks per year. Mr. Roller would also assist in the recruitment, training and motivating of the sales staff (ICC Exhibit 5, p. 3).

225. Mr. Roller has no ownership interest in any medium of mass communications (ICC Exhibit 5, p. 3). Roller has no record of civic involvement in Indianapolis nor does he have any prior broadcast experience (ICC Exhibit 5).

226. *William M. Duchon*, a Director of ICC, was born in Cleveland, Ohio. He attended public schools in Cleveland and between 1950–1952 took selected courses on a part-time basis at Cleveland College of Western Reserve. In 1953, Dr. Duchon moved to Indianapolis, where he continues to reside (ICC Exhibit 6; Tr. 713, 749).

227. Mr. Duchon was a territorial representative for a national apparel manufacturer and in 1973 became Vice-President, a position he held until 1977 when the apparel business was terminated. In 1970, Mr. Duchon helped found Lemon Tree Stores. As President, Director and 22% owner, Mr. Duchon exercises overall supervision of Lemon Tree Stores, which requires approximately 20 hours a week. In addition, Mr. Duchon spends an average of three hours a week as an independent consultant for Market and Planning Corp., an apparel manufacturing company and counseling service (ICC Exhibit 6, pp. 1–2).

228. If ICC is successful in acquiring the license, Mr. Duchon plans to devote 20 hours a week to the station. His activities would include participation in the Financial Review Committee, concentrating on the sales department of the station. He would also assist in the recruitment, training and the motivating of the sales staff (ICC Exhibit 6, p. 2; Tr. 749).

229. Mr. Duchon has no ownership interest in any medium of mass communications (ICC Exhibit 6, p. 2). He has no prior broadcast

experience and no record of civic involvement in Indianapolis (ICC Exhibit 6).

230. *Richard M. Malad*, a Director of ICC, is a lifelong resident of Indianapolis. He attended parochial schools in Indianapolis and Marian College, Indianapolis, from which he was graduated in 1968 with a Bachelor of Science degree in Chemistry and Biology. In 1973, he received a Doctor of Law degree from Indiana University (ICC Exhibit 7; Tr. 714, 750). He will not serve as an officer of ICC.

231. Prior to being admitted to the bar, Mr. Malad was General Manager of used cars for Jim Malad Motors in Indianapolis. He was admitted to the Indiana Bar in October, 1973 and since that time has been in private practice. He devotes an average of 40 hours a week to his practice. In addition, for a period of 20 months, Mr. Malad devoted an average of one day per week to judicial duties as Master Commissioner, Superior Court, Marion County, Indiana (ICC Exhibit 7, p.1).

232. Mr. Malad is 25% shareholder, Director and Secretary/Treasurer of Rapco Distributors, Inc., and serves as counsel for Rapco. He is also Director, Treasurer and counsel for the Midwest Amputee Golf Association (ICC Exhibit 7, p. 2).

233. Mr. Malad is a member of the Knights of Columbus, the St. Matthews Parent-Teachers Organization, the Indiana and Indianapolis Bar Associations and the Antelope Club (ICC Exhibit 7, p. 2).

234. In the event that ICC receives the license, Mr. Malad would devote an average of two to five hours a week to the operation of the station. He proposes to serve as in-house counsel. Mr. Malad's involvement in the ICC application has included participation in the community leader surveys (ICC Exhibit 7, p. 2; Tr. 750).

235. Mr. Malad has no present ownership interest in any medium of mass communications (ICC Exhibit 7, p. 2). He has no prior broadcast experience (ICC Exhibit 7).

236. *Mary E. Busch* is a Black female and a Director, but not an officer, of ICC. She was born in Hopkinsville, Kentucky and attended elementary school and high school in Indianapolis. She received a Bachelor of Science degree in Elementary Education from Indiana Central University in Indianapolis. In 1964, she received a Master of Science degree in Counseling and Guidance from Butler University in Indianapolis and a Doctor's Degree in Education from Indiana University in Bloomington, Indiana in 1975 (ICC Exhibit 8; Tr. 715, 751).

237. Ms. Busch was formally a teacher in the Indianapolis public school system. While pursuing her doctoral degree, she served as Graduate Assistant to the Chairman of Elementary Education Department of Indiana University and in 1974 as Research Intern for Bicentennial Internship Project in Education for the Indiana Department of Public Instruction. Between 1975 and 1977, she served as a staff aide to a Congressman in his Indianapolis office. Dr.

Busch served as an Associate Faculty Member for Indiana University—Purdue University at Indianapolis, as supervisor of student teachers in 1976 and in 1977, she assumed her present position as Director of Community Services for Indiana Central University[43] in Indianapolis (ICC Exhibit 8, pp. 1–2).

238. Ms. Busch was elected to the Indianapolis Board of School Commissioners[43] in 1976 for a four-year term. She served as President of the school board during the 1976–1977 and 1977–1978 school years. She also holds the following positions in community organizations: Indianapolis Board of School Commissioners—Member and Immediate Past President; Greater Indianapolis Progress Committee—Board of Directors; National Council of Negro Women—Indianapolis Section—Member; National Association for the Advancement of Colored People (NAACP)—Member; Indianapolis Pre-School Centers, Inc.,—Board of Directors; Juvenile Justice Task Force—Board of Directors; Indianapolis Clean City Committee—Member; Indianapolis Senior Citizen Center, Inc.—Board of Directors; Mayor's Social Service Advisory Council—Member; United Way of Greater Indianapolis—Board of Directors and Operation PUSH for Excellence—Board of Directors and has received the following awards and citations: Participation in Stanley K. Lacy Executive Leadership Training Series sponsored by the Indianapolis Chamber of Commerce; Community Service Award presented by Jack & Jill of America, educational organization—1977; Citizen of the Year Award presented by Omega Psi Phi Educational Fraternity—1977; Indiana Distinguished Citizen Award presented by IN Bicentennial Committee—1976; Mary McLeod Bethune Award presented by the National Council of Negro Women—1976; Outstanding Young Educator of the Year Award from the Indianapolis Junior Chamber of Commerce—1979 (ICC Exhibit 8, pp. 2–3).

239. Ms. Busch's duties at Indiana Central University require between 30 and 35 hours a week.

240. Ms. Busch proposes to devote an average of between 10 and 15 hours a week to ICC's proposed station. She will assist in public affairs programming, help establish policy regarding public service announcements and assist in the supervision of minority and women recruitment. In addition, she will help with station-community relations and monitor conformance with the Equal Employment Opportunity Program (ICC Exhibit 8, pp. 3–4; Tr. 751).

241. Ms. Busch has no ownership in any medium of mass communications (ICC Exhibit 8, p. 4). She has no prior broadcast experience (ICC Exhibit 8).

242. *Ligon W. Drane, Jr.*, a Black male, is Treasurer and Director of ICC. He was born in Indianapolis and continues to reside there. He

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[43] Both Indiana Central and the Indiana Board of School Commissioners are licensees of non-commercial FM stations in Indianapolis (ICC Exhibit 8).

attended Indianapolis public schools and received a Bachelor of Arts degree in 1964 from Tennessee State University in Nashville, Tennessee. In 1970, he received a Master of Arts degree in Guidance and Counseling with an education specialty from Ball State University in Muncie, Indiana. During the period between 1970 and 1972, Mr. Drane also completed 30 graduate hours beyond his Master's degree, specializing in school administration (ICC Exhibit 9; Tr. 716, 752).

243. Mr. Drane served as Graduate Residence Advisor at Tennessee State University in 1964–1965 and was a teacher in the Indianapolis public school system from 1965 to 1972. He served as Assistant Dean of Boys and Counselor of John Marshall High School in Indianapolis in 1972 and was promoted to Dean of Boys at Crispus Attucks High School in Indianapolis in 1973, a position which he continues to hold (ICC Exhibit 9, p. 1).

244. Mr. Drane has been inducted in the Alpha Kappa Mu Honor Society, an academic honor society at Tennessee State University. He serves on the Board of Directors of the Devon Civic League and served as its Treasurer in 1977. He is also a member of the Graduate Chapter of Kappa Alpha Psi social fraternity (ICC Exhibit 9, p. 2).

245. In the event that ICC receives the license, Mr. Drane proposes to devote an overall yearly average of 25 hours a week to the station. His service will, however, be concentrated during vacation periods, with station work during the school year occurring after school, evenings, and on weekends. In addition to serving as Treasurer, Mr. Drane would moderate a program, *Career Education*, which will focus on vocational and training programs and opportunities. He would also assist in the supervision and implementation of the station's Equal Employment Opportunity Program, serve as liaison between the station and the minority community, and monitor the station's public affairs program planning to ensure adequate service to all segments of the Indianapolis community. Mr. Drane's involvement in the ICC application has also included participation in the community leader surveys (ICC Exhibit 9, pp. 2–3; Tr. 752).

246. Mr. Drane has no ownership interest in any medium of mass communications (ICC Exhibit 9, p. 3). He has no prior broadcast experience (ICC Exhibit 9).

247. *Ray R. Gusky* was born in Pittsburgh, Pennsylvania and attended local public schools there and is a lifelong resident of Pittsburgh. He graduated with a Bachelor of Arts degree from Washington and Jefferson College, Washington, Pennsylvania and spent a year at Duquesne University School of Law in Pittsburgh[44] (ICC Exhibit 10, p. 1, Tr. 719).

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[44] Mr. Gusky is not an officer, Director or stockholder at the present time, nor is he a

248. While in college in 1967 and 1968, Mr. Gusky served as General Manager and Program Director of the college's non-commercial educational station, a carrier current facility. Mr. Gusky spent a brief period of time as a salesman of aluminum replacement windows, before becoming an Account Executive in local sales for standard broadcast station WTAE in Pittsburgh. He left for a brief period of time to resume a career as General Sales Manager for a window replacement firm and in 1975, returned as an Account Executive, local sales, for WTAE. In 1977, he was named Sales Manager, local sales, for WXKX(FM) in Pittsburgh and in July, 1978, he became an Account Executive, local sales, for WDVE(FM), Pittsburgh, Pennsylvania. In September, 1978, Mr. Gusky was appointed General Sales Manager for station WJOI(FM) and on February 26, 1979, became General Sales Manager of standard broadcast stations WYJZ and WAMO(FM), Pittsburgh, Pennsylvania (ICC Exhibit 10, p. 2).

249. Mr. Gusky has no ownership interest in any medium of mass communications (ICC Exhibit 10, p. 3).

250. In the event that ICC receives the permit, Mr. Gusky, a stock optionee, will serve as General Manager and oversee the day-to-day operations of the station (ICC Exhibit 10, p. 1).

251. The ICC application contains provision for a standby generator to serve as a source of power during an emergency so as to maintain broadcast service.

Past Broadcast Record of Leonard Walk

252. Leonard Walk seeks a separate merit for Walk's prior broadcast record. ICC did not make a threshold showing on the claimed unusually good past record as required. See *Pleasant Broadcasting Co.*, 19 FCC 2d 964 (Rev. Bd. 1969) and *Western Television Co.*, 50 FCC 2d 465 (Rev. Bd. 1974). The showing was submitted as part of ICC's direct testimony. While the showing could be rejected on procedural grounds, it will be considered on its merits.

253. The showing consists of a group of renewal applications including the 1972 renewal application for WUFO and WAMO (AM and FM); the 1971 renewal for WILD and the 1972 assignment application for WLTO (now WCMQ).

254. All of the renewal applications filed by licensees in which Walk had an interest reveal relatively high percentages of news, public affairs and other non-entertainment programs (ICC Exhibit 2, pp. 5–6 and Attachments I-M). However, Walk received a letter from the Chief, Renewal and Transfer Division of Broadcast Bureau in June, 1969 in regard to the 1969 renewal applications of WAMO (AM

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subscriber to any ICC stock (ICC Exhibit 1; Tr. 1318). He holds an option to purchase increments of stock over a five-year period commencing at the time he assumes the position of General Manager. If he should leave the employ of ICC, he must sell any stock purchased back to the corporation (ICC Exhibit 1).

and FM). The letter questioned the purported commitment to serve the Black population of Pittsburgh with the fact that only 11 minutes of public affairs programming had been broadcast (Peoples Exhibit 27, pp. 19–20). In addition, the letter raised an issue of promise versus performance in that while 10% news and 7% public affairs had been previously proposed by WAMO-AM, the composite week revealed that only 4.6% news and 0.2% public affairs were broadcast. The Bureau also questioned the drop in news on WAMO-FM from 6% proposed to 2.08% broadcast during the composite week. Walk replied to the Bureau that the total of 11 minutes of public affairs programming was an aberration and he explained that 4.6% news is considered more realistic than the 10% proposed (Peoples Exhibit 27, p. 23).

255. Walk was also questioned by the Commission when he filed a transfer application in 1970 about programming changes on station KKAR. Here, Walk was required to explain why the decrease in news programming from 11.4% to 7.4% and public affairs from 2.4% to 0.5% (Peoples Exhibit 23, pp. 12–19). Applications filed by Walk, prior to 1972, were replete with deficiencies in the performance of the stations when compared to promises by differences of 37 to 54% under the promises made with respect to non-entertainment programming (Peoples Exhibit 25, p. 3; Peoples Exhibit 27, p. 3; Peoples Exhibit 21, p. 4 and Peoples Exhibit 22, pp. 3–4). In all the stations in Walk's past broadcast record, he was the only integrated owner responsible for operation of the station, except the General Manager of KKAR who was a full-time employee of the station (Tr. 1251–52).

Conclusions

Issue 1

1. Before dealing with the facts of record and the conclusions which can be made on such facts, the weight and probative value to be attached to the first two WIFE proceedings in Docket 16612 and 19122 must be set out. In the two prior WIFE proceedings, Mr. Kiley was only a witness and the Decisions in the two prior WIFE cases concerned the qualifications of Star Stations and Don Burden to be a Commission licensee. Although Kiley certainly was a factor in the two prior Decisions.

2. The Presiding Judge has attempted to make clear in this proceeding that the rulings and exceptions and findings by the Commission in these two prior WIFE cases created rebuttable presumptions to the extent they find support in the record evidence in those two proceedings. To this extent the parties, other than RCCI, were required to excerpt from the two prior WIFE proceedings those parts of the record which were to be used in the instant proceeding in order to put RCCI and Kiley on notice as to what must be rebutted.

The prior records in the WIFE proceedings are not *res judicata* as to Mr. Kiley or RCCI. Initially, in the *Memorandum Opinion and Order* designating this case for hearing, the Commission refused to permit RCCI to introduce any testimony that conflicted with what had been offered in the prior WIFE records. When it was called to the Presiding Judge's attention that the case cited in the Designation Order [*Red Lion Broadcasting Co., Inc.*, 42 FCC 2d 1116 (R.B. 1973)] was a Review Board decision that had been explicitly overruled by the full Commission (63 FCC 2d 145 (1977)) on the very point of whether a non-party to a prior Commission proceeding would be bound by findings and conclusions made there, the Presiding Judge then established ground rules based on a procedure which permitted RCCI[45] the opportunity to submit testimony contrary to that which had been previously submitted in the WIFE hearing records and, at the same time, enabled maximum use to be made of the two prior hearing records. Based on this approach to Issue 1, the various elements of the prior WIFE proceedings will be considered.

Conclusion as to Kiley's Conduct Regarding Contests at WIFE

3. Two contests were run by WIFE while Kiley was the General Manager. They were the "13 Car Sweepstakes" and the "$1,000 Mystery Melody Contest". The "13 Car Sweepstakes" took place in the spring of 1966. It was a drawing whereby the one winner could select one car from 13 cars which were advertised. The contest had been produced by Star Station headquarters and was to be run on all its stations. Kiley, on being exposed to the materials to be used to promote the contest, believed they were unclear in some respects, i.e., the possibility that listeners could believe that 13 cars instead of one car would be given as a prize. Kiley instructed the WIFE staff to run a tag line to correct any misconception as to how many cars were to be given away. The record contains some dispute as to just when such tag line announcements were commenced, but, the record does establish that the tag line was run on a regular basis and did inform listeners that only one car would be awarded. The drawing was held on April 30, 1966. The Indianapolis Better Business Bureau made inquiries on the car contest because it was in receipt of a communication from the Omaha Better Business Bureau where complaints had been received relative to WIFE's sister station KOIL's running of the same contest. Kiley went to the local Better Business Bureau office on June 20, 1966 and at that time stated there were "virtually no complaints". In 1979, in the instant procedding, Kiley stated that there were no complaints at all. This difference in testimony is not regarded as crucial to resolution to the issue and it is concluded that Kiley's actions with respect to the "13 Car Sweepstakes" were responsible and appropriate in the situation.

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[45] RCCI is also sometimes referred to as Circle City.

4. The second contest is the "$1,000 Mystery Melody Contest" and this contest did involve wrongdoing. This contest was manipulated by a listener who convinced an 18 year old relatively new WIFE employee to by-pass the normal procedures and instructions as to the use of random selected names to be called as contest participants. The listener identified the mystery melody and was awarded the prize. The following day, the actions of the listener and WIFE operator were discovered and Kiley then dismissed the operator and notified the so-called winner that under the circumstances the prize would not be forthcoming. WIFE made the announcement to this effect on-the-air and then donated $2,000 to a charity selected by the Mayor. This matter was then reported to the Commission. As is typical in this type of situation, Kiley's first act was to fire the 18 year old new inexperienced employee most directly involved. This standing alone, forms no basis for a conclusion. Rather, it is Kiley's overall supervision of the contest. The record does show that an acceptable means was instituted to produce a true random selection of names to be called. Perhaps the instructions were not as complete as they should have been, but, they were adequate.

5. The record also shows that there was a means to ascertain that the so-called winner had not been selected from the list of random names provided to the operator and that steps were promptly instituted by Kiley to correct a bad situation with both the public served by WIFE and the Commission. Thus, it is concluded that Kiley in this instance acted responsibly and no adverse conclusion can be drawn from Kiley's participation in this incident.

Conclusions as to the Fraudulent Billing Practices

6. Again, as with the contests, there is no question but that Star Stations did conduct a fraudulent billing scheme at WIFE and the Commission has so found in Docket 16612. The question here to be resolved is the extent that Kiley may have known of, condoned, supervised or otherwise have been involved in this misconduct found to exist at WIFE. It has been clearly established and found that from November, 1963 until mid-1965, WIFE furnished innumerable statements of accounts to clients over affidavits that contained inaccurate information as to the times and dates that commercials were broadcast. The Star Stations attempted to assign full blame for the fraudulent billing to its then General Manager, Ron Mercer. The Presiding Judge in that case (Docket 16612) found both Mercer and Burden were "in pari delicto" on the fraudulent billing scheme. The Commission, while generally agreeing with the facts and the conclusions in the Initial Decision, found that Burden did not have actual knowledge of the scheme and renewed WIFE's licenses for six months. This entire matter is now re-examined to determine Kiley's part in this. At the time Kiley was the WIFE Local Sales Manager and he had this position during most of the time in question. Kiley

insisted that as Local Sales Manager, he had nothing to do with national or regional sales, but Kiley did have some input into such sales when Mr. Mercer was away. It appears that in early 1965, Kiley would make inquiries of the Traffic Department personnel about a national or regional sales account and he would be told in effect that these accounts were Mercer's and none of Kiley's business. Much testimony is contained in the record that either it was Star Stations' policy or the policy of Mercer as General Manager of WIFE to operate each office as a closed shop and one just did not obtain information on WIFE operations unless he had a right to know what was being done in a particular area. Kiley was suspicious of Mercer, but Mercer would reassure Kiley that everything was alright. This leads to some dispute between the prior WIFE records and the instant record as to who at WIFE can take credit for uncovering the fraudulent billing practice. In Docket 16612, it was Kevin Sweeney who discovered the fraudulent billing practice in June, 1965 upon finding a suspicious Mercer memorandum on the Traffic Manager's desk. Still, based upon the Docket 16612 record, Sweeney then went to Kiley and asked about the memo and Sweeney was led to believe, based on the conversation and some body language, that the fraudulent billing practice was not confined to one account, but, Kiley was powerless to stop it. In any event, the fraudulent billing was made known to all concerned in June, 1965 and Star Station attempted restitution for the billed advertisers, ran a newspaper ad stating what they had done and stated that Mercer had been discharged. Kiley did not dispute Sweeney's version of the discovery during the Docket 16612 proceeding. But, now in this proceeding, Kiley takes the credit for the discovery of fraudulent billing and relating this to Sweeney. However, as cross-examination in the instant proceeding continued on this point, it appears that Kiley could not recall the substance of his conversations with Sweeney. No doubt if Kiley could have established that he discovered this illegal scheme and took steps to terminate it, his chances of resolving Issue 1 favorably to Circle City would be enhanced.

7. Due to the extreme departmentalization at WIFE, Kiley insists that he had neither prior knowledge nor involvement with the fraudulent billing. The prior WIFE proceedings do not appear to involve Kiley in the fraudulent billing. However, there is a chain of circumstantial evidence which must be considered. This is based on Kiley's position as Local Sales Manager at the time. About half of the WIFE inaccurately-billed accounts were local accounts. As such, they were under the control of Kiley who had seven salesmen under his supervision. Kiley states that when one of his salesmen turned in an order he would only check to see if the rate was correct and whether a credit check was required. After this, the orders were typed and distributed to the Traffic, Accounting and Production Departments. Kiley states he never received affidavits sent to

clients. He states his only contact with the Traffic Department was related to the sales load. This sales load information was provided to his sales staff by means of two meetings a day, Monday through Friday and one meeting on Saturday. Kiley said he did not receive copies of program logs and he did not compare invoices against program logs. In late 1964 and early 1965, WIFE was the number one station in Indianapolis and with perhaps 300–400 accounts per month it was not possible for Kiley to check if such accounts were properly billed. However, with all these disclaimers on Kiley's part, Kiley was an expert radio time salesman and had been so since 1959. He knew the procedures and he knew what fraudulent billing was. Thus, as a seasoned veteran radio time salesman, with supervision over seven salesmen, the presumption exists that if anyone would know what was going on in the local sales department, it would be Kiley. However, such presumption is not valid in this case as neither Burden's or Mercer's testimony in the prior case implicates Kiley and Kiley, the sole witness called in the instant case has denied having any part in fraudulent billing practices. Based on the in-house operation procedures and Kiley's testimony, credit must be given to his denial of having a part in such scheme. No comparative demerit or disqualification can be found based on Kiley's uncontroverted testimony that he was not involved in the WIFE fraudulent billing.

Conclusions on Kiley's Conduct in re Violation of 18 USC Section 610

8. In the Commission's 1975 Decision in Docket 19122, Kiley is implicated with the Hartke matter primarily through the testimony of Mercer. This involved a WIFE scheme to give the Senator free advertising time. The Commission also accepted Mercer's testimony as being credible and as proving that "Burden was privy to a scheme which involved a sham contract" to give free time to the Senator. As indicated in the findings of fact in the prior WIFE case, the Hartke matter also involved both free advertising and favorable mention of Hartke on WIFE newscasts. There is nothing in this record or the prior WIFE records to implicate Kiley with the newscasts so only the free advertising is considered herein. It is also noted that in the prior WIFE proceeding, Burden, Mercer and Kiley testified and in this proceeding only Kiley testified. Also, it must be kept in mind that Kiley was only a witness in the WIFE proceedings and the record in those prior proceedings establishes a rebuttable presumption in this case. It was Mercer's testimony in the WIFE proceeding that Burden assigned Mercer and Kiley to handle all WIFE political accounts in 1964 and their duties were to be shared 50–50. Mercer states that Kiley, at Mercer's direction, took a contract for the Hartke commercials to the Hartke headquarters where it was signed by Mace Broide, Hartke's Administrative Assistant. Because Burden was

upset about the sham contract being executed by one so close to the Senator, a second contract was prepared and a more distant "patsy" - Lewis - was found to execute this contract. Mercer states both he and Kiley went to the office of Lewis where the contract was signed and that Mercer had specifically brought Kiley along because Mercer alleged Kiley had worked on the account and Mercer wanted someone else to be aware of what was going on. Mercer went on to describe the Lewis contract in terms of what "we" had done, that is to say, Mercer and Kiley were the "we". At this point, a major dispute developed between RCCI and all other parties in this proceeding because the prior Commission Decision in WIFE accepted Mercer's version of the events and rejected Kiley's version. Counsel for RCCI urges that the prior Decision stands only for the proposition that Burden was involved in the Hartke scheme and, this being the case, it was not necessary to resolve every conflict of testimony such as the conflicting testimony between Mercer and Kiley on this matter. It was Burden's involvement in the Hartke matter that was at issue and Kiley's part was not at issue, argues RCCI. Based on the facts in both this proceeding and the prior WIFE case, Kiley denies the Mercer version in all decisional respects. Is the testimony of Mercer in the WIFE proceeding which was credited by the Commission's Decision in effect *res judicata*, or can Kiley now explain or deny the Mercer version insofar as it may be relevant to the issue in this proceeding? Based on the rule of the case upon which this case was tried, the prior record continues to be a rebuttable presumption. This in no way disturbs the prior Decision that Burden was involved in the Hartke matter, but does permit a re-examination of the events on the conflicts between the Mercer and Kiley version of their individual or joint participation in this event.

9. Kiley was involved in the 1964 political time sales to the extent he serviced the 1964 Brannigan gubernatorial campaign, and Kiley admits this. Kiley specifically denies his part in obtaining the so-called "Broide" contract. No "Broide" contract has ever surfaced in this proceeding or the prior WIFE proceedings. Kiley denies knowing Broide and Broide testified in the prior proceeding that he did not know Kiley. There was no finding in the WIFE proceeding that Broide signed a contract - only Mercer's testimony that the contract was signed and returned to WIFE by Kiley. Thus, while Kiley continues to deny any part in the Hartke matter, and the prior hearings leave many unanswered questions, this is not surprising since Kiley was not the issue in the Star Stations proceedings. However, there are some key connections between Kiley and the Hartke matter. Burden had Dorothy Storz prepare a second WIFE cash statement deleting the projected income for the Hartke commercials which commercials had been included in the first such statement. It was absolutely essential, in Burden's view, to have all copies of this second WIFE cash statement collected and returned to

WIFE headquarters. The existence of such second cash statement constituted a clear implication that Hartke was being provided free advertising and constituted substantial proof that the contract was a sham as charged by the Commission. Thus, Mrs. Storz, at Burden's direction, requested Kiley to return a copy of the second statement she knew was in Kiley's possession. Kiley did as directed by Mrs. Storz. Kiley indicates that this was just part of a substantial volume of papers he sent back to Star Station headquarters. Next is Kiley's involvement with the Haskins and Sells accounting firm when Kiley advised that collection of the Hartke bill was improbable. Kiley has failed to offer any explanation for his belief that the collection was improbable. Kiley appeared to write-off this account as not collectible as all you have is "confetti on the ground". But Kiley knew that the Senator had won the election and thus the write-off of this debt cannot be said to have stemmed from a prudent business practice. Given the Burden reputation shown in the prior Star Station proceedings for urging his sales personnel to increase revenues for advertising and Kiley being the expert for increasing sales at both WISH and WIFE, it is inconceivable how over $5,000 in amounts due for the Hartke campaign could be so readily dismissed by Kiley absent some knowledge of the true nature of the account. Lastly, there is the matter that Kiley was paid a bonus on the accounts sold which included the Hartke account. RCCI takes strong exception to any conclusion based on the bonus and draws a clear distinction between a bonus and a commission. The commission would be for a specific time sale whereas the bonus is based on total sales. Kiley continues to deny any knowledge that his bonus was based in part on the sale of the Hartke spots. However, it is inconceivable how Kiley, an experienced salesman, would not have knowledge of the basis for all money either paid or due him by the station.

10. Conceding that many details of the Kiley participation in the Hartke matter are not clear, it is reasonable to conclude that Kiley did have knowledge of the Hartke matter and in particular those efforts of Star Station to cover up this event after the Hartke advertisements had been completed. It was Kiley who sent the incriminating second statement back to Star Station headquarters and it was Kiley who indicated to the accountants that the Hartke account could not be collected. Even if full credit is given to Kiley's denial of having worked with Mercer on the account, Kiley's activities after Mercer had departed were essential to the Star Stations' attempt to cover up the existence of the scheme.

Conclusions on the Porter-Byers Matter

11. The critical area under consideration here concerns Kiley's alleged attempt to frustrate or interfere in the Commission's processes centers around the investigation of WIFE conducted by the Commission in June of 1969. In paragraph 37 of the Commission's

Decision in Docket 19122, it found that "Kiley refused to permit Commission investigators to question WIFE employees [Messrs. Byers and Porter] in 1969 until they had been offered and accepted the assistance of Star's counsel". RCCI points to a series of events in which it alleges that the Commission's prior decision does not represent a rebuttable presumption against Kiley. RCCI argues that the Judge in Docket 19122 had made findings and conclusions which exculpated the station and Kiley in the Byers and Porter matter. The Bureau filed an exception to the Judge's finding in this respect (Exception 75) and the Commission "Granted in Substance" this exception. It is the RCCI position that there is no evidence in the record of the prior proceeding which would support the exception.

12. Kiley in this proceeding has essentially reiterated his Docket 19122 testimony, again asserting that he was merely following the advice of counsel and he did not refuse to permit Commission investigators to question two WIFE employees—Byers and Porter—until the employees had been offered and accepted the assistance of Star Station legal counsel.

13. The RCCI argument of the lack of a rebuttable presumption here is rejected. Kiley was found to have arranged an interview of employees of WIFE with Commission investigators under harassing and intimidating circumstances. Kiley was aware that the WIFE stations were under investigation at the time and the two WIFE employees were non-management level that could be fired by Kiley. Thus, there exists an inference that Kiley did know that Byers and Porter would have no real choice but to meet with the investigators in the company of the WIFE legal counsel. However, on observing Kiley in this case, his testimony is accepted that he was acting on the specific instructions of Burden and legal counsel and was not aware until much later of how the interview with Byers and Porter was conducted. This being the case, it is concluded that Kiley's part in the interview with Byers and Porter was passive and cannot be charged with intimidating employees during the Commission's investigation.

14. It is therefore concluded that there is no evidence that Kiley intentionally harassed or intimidated Byers or Porter and Kiley has explained his passive role in the previous hearing that Star Station did harass and intimidate the two employees.

Mr. Kiley's Conduct in re Harassment of Ronald Mercer

15. As with the consideration of the Byers-Porter matter, Kiley's possible harassment of Mercer, the Commission's Decision on this matter insofar as Kiley is involved, is disputed by RCCI. RCCI against states that when the Commission granted in substance the Bureau's Exceptions 72, 73, 74 and 92, the Commission Decision still does not once mention Kiley by name as being responsible for any actions taken by WIFE against Mercer. RCCI then urges that it is

against this background that Kiley's behavior *vis a vis* Mercer must be re-examined to determine, in the words of Issue 19 in Docket 19122, if Kiley "engaged in efforts to coerce, harass, and intimidate [Ron Mercer] for the purpose of frustrating or interfering with the Commission's processes". However, even without the benefit of the Commission's conclusions regarding the prior record, and affording no weight to the testimony of Mr. Mercer in the prior WIFE proceedings, a number of unfavorable conclusions must be made based on Kiley's testimony in the prior proceedings and in the instant proceeding. It appears that Kiley did accept advertising business from Mr. Mercer as long as Mercer was associated with advertising agencies which placed significant business with WIFE. In late 1970, Kiley learned that Mercer was going into the advertising business on his own and that Mercer had only one client—Simpson-Stygall. Also about the same time, Kiley learned that there was to be a second WIFE proceeding and that Mercer in all likelihood would again testify adversely to WIFE. It was at this point that Kiley required Simpson-Stygall to pay Mercer his commission, contrary to the usual industry practice, and, contrary to the way Mercer advertising accounts were treated when Mercer was associated with advertising agencies having substantial business with WIFE. Kiley has offered a number of explanations for his handling of the Simpson-Stygall account. Kiley states that it was Mercer's signature on a sales contract that caused his reaction, but Mercer's name, perhaps not his actual signature, had appeared on a number of such sales contracts since Mercer had departed WIFE. Kiley suggests that perhaps Mercer may not have paid either the station or Mr. Stygall. However, Stygall had already paid the bill and this was already well past the stage when the Mercer contract for the Stygall advertising was presented. None of the Kiley explanations in this or the previous records are credible except his original explanation that when Kiley knew of Mercer's involvement in the forthcoming second WIFE proceeding and that Mercer, now in business for himself, had only one client—Simpson-Stygall, Kiley chose to strike out at Mercer. Kiley was not merely passively following instructions of Burden and legal counsel as was found in the Byers-Porter matter. Here, Kiley was the prime mover against Mercer at the first opportunity such action could be taken when there would be no major adverse impact on the time sales by WIFE. Mercer then had only one client—Simpson-Stygall, and Mercer was again a threat to WIFE's very existence as a potential and adverse witness. It follows that any threat to WIFE would also be a threat to Kiley's existence as the General Manager of WIFE.

16. Kiley continues to deny any intent to dissuade Mercer from testifying before the Commission in the second WIFE proceeding. Rather, Kiley alleges that he was actually trying to protect inconsistencies between his own testimony and that of Mercer in the

forthcoming WIFE proceeding and that Kiley was extremely leary of Mercer's business scruples. Kiley urges that this explanation of his actions may not appear logical, but, it accurately represents his state of mind at the time. However, one must be held responsible for the observable consequencies of such action. When consideration is given to the timing, and the past regular business dealings with Mercer and possible adverse testimony by Mercer against WIFE, it must be concluded that at least in substantial part, Kiley's act on the Simpson-Stygall account was either intended to affect Mercer's testimony in impending testimony before the FCC or to cause Mercer harm in retribution for what Mercer had testified to in the Docket 16612 proceeding. Accordingly, even when the Mercer testimony is not credited in the instant record and giving credit to Kiley's denials of other alleged harassment of Mercer, it is clear based on the Simpson-Stygall account alone, that Kiley did make a concerted effort to damage Mercer's business credibility and to harass Mercer at a time that Mercer would testify against them.

Summary of Conclusions on Issue 1

17. It is concluded that Kiley did participate in the WIFE cover-up of the Hartke matter at least with respect to the return of the damaging second statement of account to Mrs. Storz and Kiley's part in advising an accounting firm that the Hartke account was uncollectable. It is also concluded that Kiley did directly participate in the intimidation and harrassment of Mercer at a time when Kiley knew that Mercer would be an adverse witness against WIFE in a forthcoming proceeding. Other activities of Kiley as developed in the two prior WIFE proceedings are not found to be a basis for any basic or comparative disqualification of RCCI. Nevertheless, the two areas where Kiley was found to have been substantially involved are of serious concern in the evaluation of a proposed new licensee. In this respect, the position of the Bureau is accepted, i.e., Kiley's activities while with WIFE would be a basis for disqualifying RCCI, but for the passage of time. The Kiley activities found objectionable all occurred some eight to fifteen years ago and the record contains no evidence that Kiley has acted in any way except as a responsible businessman and citizen of his community. Accordingly, RCCI will not be found basically disqualified. Rather, a substantial comparative demerit will be assessed.

Issue 2(b)[46]

18. Subpart (b) of Issue 2 seeks to determine the effect of ICC's failure to report litigation involving Mr. Zebrowski upon ICC's basic or comparative qualifications to be a licensee. The litigation involves, among others, Zebrowski as an individual and Zebrowski &

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[46] Issue 2(a) has been resolved in paragraph 73, *infra* based on a summary decision.

Associates as defendants in a large number of civil suits involving potential damages of several million dollars. This pending Zebrowski litigation was not reported to the Commission and, thus this constitutes a violation of Sections 1.65 and 1.514 of the Rules.[47] Prior to the designation of the ICC application for hearing, ICC contended that the violation was unintentional and that it should be assessed a comparative demerit only. However, the Commission noted in paragraph 28 of the Designation Order that Zebrowski, as one of the guarantors of the $500,000 bank loan made Zebrowski's financial condition a matter of great significance to ICC. Thus, ICC had a motive to conceal the Zebrowski litigation[48] from the Commission and Issue 2(b) was specified.

19. As matters developed after the Designation Order was released, Zebrowski is no longer a guarantor of the ICC bank loan and the resolution of the litigation involving Zebrowski would not have an adverse impact upon ICC's loan commitment as found in the summary resolution of Issue 2(a). Also, in resolving this issue, it is noted that the litigation involving Zebrowski does not involve any question of character or antitrust. Further, it appears that Zebrowski has been otherwise candid about the pending litigation in that the suits pending against Zebrowski & Associates have been noted routinely in corporate financial statements. The uncontroverted evidence does establish that Zebrowski's failure to report the pending litigation was inadvertent. He had been informed by his local counsel that there was no legal basis upon which he could be held personally liable. No evidence has been submitted which would show fraud, concealment or other serious misconduct. Accordingly, it is concluded that the evidence of record does not justify a disqualification of ICC. However, the question of a comparative demerit remains.

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[47] Section 1.65 of the Commission's Rules states, in pertinent part: "Each applicant is responsible for the continuing accuracy and completeness of information furnished in a pending application or in Commission proceedings involving a pending application. Whenever the information furnished in the pending application is no longer substantially accurate and complete in all significant respects, the applicant shall as promptly as possible and in any event within 30 days, unless good cause is shown, amend or request the amendment of his application so as to furnish such additional or corrected information as may be appropriate. Whenever there has been a substantial change as to any other matter which may be of decisional significance in a Commission proceeding involving the pending application, the applicant shall as promptly as possible and in any event within 30 days, unless good cause is shown, submit a statement furnishing such additional or corrected information as may be appropriate . . . . Section 1.3514(a) of the Commission's Rules states: "Each application shall include all information called for by the particular form on which the application is required to be filed, unless the information called for is inapplicable, in which case this fact shall be indicated."

[48] Issue 2(b) includes an inquiry into possible misrepresentation by ICC.

20. Section 1.65 of the Rules does require that: "The Commission is to be informed of all facts, requested in Form 301 or not, that may be of decisional significance so that the Commission can make a realistic decision based on all relevant factors." *Southern Broadcasting Co.*, 33 FCC 2d 1044, 1048–49 (1972). Even if Zebrowski were not named a defendant, he would still have a duty to report under Rule 1.65. See *Post-Newsweek Stations, Florida, Inc.*, 49 FCC 2d 92, 94 (1974). Moreover, the failure of an applicant to comply with the reporting rules cannot be excused because the decision not to report was predicated on advice of counsel. *Lorain Community Broadcasting Co.*, 18 FCC 2d 686, 688 (1969).

21. The argument of ICC is rejected which urges that FCC Form 301 does not require the disclosure of litigation in commercial litigation where no judgments have been rendered. Thus, argues ICC, it is only when Rule 1.65 is combined with the so-called "gloss" on Rule 73.3514 that the question of potential decisional significance of litigation becomes involved. From this point, ICC argues that the several bank loan commitments went through various stages to a point where the bank had specific knowledge of the Zebrowski litigation and still permitted him to serve as a guarantor on the loan commitment to the final loan commitment in which Zebrowski has been eliminated as a guarantor. The ICC argument as to the "gloss" provided by Section 73.3514 of the Rules is rejected as the Rule is designed to insure that the Commission is provided with all necessary informative nature by an applicant and in this case substantial time elapsed both before and after designation for hearing where the litigation information concerning Zebrowski was essential to his standing as a guarantor and the Commission was not provided such information during this time period. Accordingly, absent a showing of intent, ICC still has violated the Commission's reporting requirements and a comparative demerit should be assessed against the applicant.

Issue 3

The Comparative Case

Peoples

22. The question of diversification is first considered in terms of a possible comparative demerit because Lafayette Road Corporation, wholly-owned by Peoples' shareholders Joseph and Daniel Cantor, owns and operates eight motion picture screens in the Indianapolis area. In making this evaluation, it is important to consider that the objective underlying the Commission's diversification policy is the "distinct connection between diversity of ownership of the mass media and the diversity of ideas and expressions required by the First Amendment". *Citizens Community Center* v. *FCC*, 447 F. 2d 1201, 1213 n. 36 (D.C. Cir 1971). Thus, the *Policy Statement*, 1 FCC 2d

at 394 n. 4 states that diversification advances the First Amendment goal of achieving the "widest possible dissemination of information from diverse and antagonistic sources". In addition, the diversification policy can be said to advance a second goal, namely the public interest standard which takes into account antitrust policies designed to foster economic diversity, i.e., competition in the market place. However, the primary goal of the diversity policy is "the idea of diversity of viewpoints from antagonistic sources [which] is at the heart of the Commission's licensing responsibility". *Newspaper-Broadcast Cross Ownership,* 50 FCC 2d 1046, 1080 (1975).

23. The cases which have found motion picture theatres to be a media of mass communication are premised on the fact that theatres compete for consumer time *vis a vis* television. See *Barnes Enterprises, Inc.*, 69 FCC 2d 1957 (Rev. Bd. 1978). No case can be found where motion picture theatre ownership was found relevant to the more important of the two objectives under the diversification policy, i.e., the dissemination of ideas from antagonistic sources. It can be concluded that a motion picture theatre owner, as distinguished from a producer or distributor of motion picture films, does not act as a source for diverse ideas.

24. Having reached the conclusion that motion picture theatre ownership does act as a source for diverse ideas, the question remains whether theatre owners compete with radio broadcasting so as to invoke the Commission's goal of economic diversity. In *Paramount Television Productions, Inc.*, 17 FCC 164 (1952) (ABC-Paramount Merger Case), it was found that actual or potential competition does exist between theatres and television with respect to: (1) audiences, (2) product and (3) advertising (17 FCC at page 30). This question of competition between products or services is discussed in *Newspaper-Broadcast Ownership, supra* at page 1065. Thus, it appears that advertisers view newspapers and television as interchangeable, and the viewing TV public may substitute reading the news in a newspaper for watching television news broadcasts. The relationship between a consumer going to the movies and listening to the radio, as involved in the instant situation, is not so clear. For example, the advertising time sold by a movie theatre between showing of a feature film is only a distant substitute for advertising on a radio station. But, both radio and movie picture theatres do compete for the consumers' free time. However, the Commission has found theatre ownership irrelevant to the issue of diversity in the context of a comparative broadcast proceeding. *Williamsport Radio Broadcasting Associates, Inc.*, 22 FCC 1204 (1957) particularly where other motion picture theatres far outnumber those controlled by Lafayette Road Corporation in the same area. Also see *Barnes Enterprises, Inc.*, 69 FCC 2d 1957, 1962. Accordingly, it can be concluded that the Joseph and Daniel Cantor ownership of motion picture theatres does not give rise to the First Amendment

implications underlying the Commission's diversification policy and any question of economic diversity to the extent it exists is found to be *de minimus*. No diversification demerit will be assigned to Peoples on the ownership of motion picture theatres.

25. Peoples proposes integration of 58% of its stock ownership in management on a full-time basis—Mr. Joseph Cantor, Mr. Andrew Johnston and Ms. Linda Jubert—and integration of 42% of its stock ownership in management on a part-time basis (Mr. Daniel Cantor). The Peoples corporation is under control of the Cantor family. The day-to-day operation of the radio station will be headed by Joseph Cantor who is 74 years old. Substantial argument has been presented as to Mr. Cantor's commitment to spend 40 hours a week to the management of the station in view of his age. There is evidence that should the grant go to Peoples, Daniel Cantor, his son, would take over some of the father's present duties at Lafayette. The primary support for the argument that Joseph Cantor's proposed 40-hour per week participation is not feasible is based, in the final analysis, on the presumption that a 74 year old man is incapable of meeting a full-time employment commitment. There is no evidence of record which mitigates against such commitment. The question of age came up in *Gainesville Media, Inc.*, 69 FCC 2d 104 (I.D. 1977). Here, the proposed 30-hour a week participation of a 61 year old man was challenged where he would also devote 20 hours a week to his accounting practice. The argument was made that the 61 year old man was semi-retired. The Presiding Judge rejected this argument. It is concluded that Joseph Cantor is entitled to credit for full-time based on the record. Joseph Cantor is also a local resident and has engaged in civic activities but he has no prior broadcast experience. Joseph Cantor's ownership in motion picture theatres has previously been found not to warrant a demerit under the diversification criteria.

26. The proposed full-time General Manager of Peoples' radio station would be Andrew C. Johnston. However, by virtue of Mr. Johnson's 10% stock interest he would not be in a position to control the day-to-day affairs of the radio station. The Cantor family controls the proposed station. Next, Mr. Johnston seeks to enhance the quality of his integration based on Johnston's past broadcast record. This broadcast record covers a period of a little over three years—most of this period as General Manager of Station WTLC. The record does reflect that WTLC did produce some meritorious programming, but, the non-entertainment programming for the station was just about on target with its previous promise. On balance, it cannot be concluded that the WTLC programming so far exceeded the range of an acceptable average that special credit should be awarded Johnston for his role in WTLC. Even if it could be concluded that the WTLC programming was above average, consideration must be given to the fact that during the relatively brief period (3 years approxi-

mately), the licensee received notices of violation of the Commission's technical rules and on three occasions, there was a violation of the United States Code provisions against the broadcast of information concerning lotteries. Mr. Johnston has attempted to explain the lottery violation in the sense that he was the General Manager during only one of these violations. However, he was a part owner and officer of WTLC during the period and he cannot claim the benefits of the station record without also accepting the burdens of that record. Mr. Johnston is not entitled to any enhancement of his position for past broadcast record. He does, however, have past broadcast experience and local residence.

27. Ms. Linda Jubert would work full-time as Operation Manager of Peoples' proposed radio station. Ms. Jubert is a Black female with past broadcast experience. The question of a merit in the evaluation process will be considered *infra* since all five applicants have some degree of minority participation. Ms. Jubert is a local resident and has participated in the civic activities in the community.

28. Mr. Daniel Cantor will be the Assistant Treasurer, Director and 42% owner. He is 24 years old and will be available to start work at the conclusion of his schooling. He proposes to devote part-time to the station (30 hours a week) and he has no past broadcast experience. He has not been involved in community activities, but, he is a local resident. Other applicants have urged that the qualitative credit for Daniel Cantor be reduced because of his youth (24 years old). A similar argument is advanced based on Joseph Cantor's old age (74 years old). It has been previously concluded that mere old age, standing alone, does not form a basis to question the full-time participation. Likewise, the 24 year old son, Daniel, will receive slight credit for his proposed part-time participation. It is recognized that Daniel Cantor lacks broadcast experience and civic participation, but, to deny credit to Daniel Cantor would be inconsistent with the Commission's *Policy Statement* that holds emphasis on broadcast experience could discourage newcomers. 1 FCC 2d at 396.

RCCI

29. RCCI proposes to integrate 61.11% of its stock ownership on a full-time basis through Robert Kiley—the proposed President and General Manager of RCCI. In addition, two stockholders—Hallie Bryant and Sam H. Jones—each own 5.55% of RCCI and will devote five to ten hours a week to the proposed station. The other five stockholders—Doninger, Young, Wyatt, Lipman and Roger Kiley—will be Directors of RCCI but will not participate in the day-to-day operation of the station. On a quantitative basis, RCCI is entitled to the 61.11% ownership-integration credit for Robert Kiley. RCCI's proposal for part-time participation of five to ten hours per week for

Jones and Bryant cannot be afforded credit under the integration of ownership and management criteria since their integration proposals do not call for significant participation in the day-to-day affairs of the station. See *Policy Statement,* 1 FCC 2d 395–96; *Mid-Florida Television Corporation,* 69 FCC 2d 607, 649 (Rev. Bd. 1978); *Midwest Broadcasting Company,* 70 FCC 2d 1489, 1494–95; *Radio Gaithersburg, Inc.,* 72 FCC 2d 821, 828 n. 8 (Rev. Bd. 1979). However, one additional fact must be considered and that is that both Bryant and Jones represent minority ownership (Black).[49] Under the Commission's holding in *WPIX, Inc.,* 68 FCC 2d 381, 411–12 (1978), Black ownership is a facet of integration of ownership and management criterion. While some credit may be gleaned for minority ownership divorced from the operation of the station, the Commission has made it clear that the benefits of minority ownership cannot be divorced from the manner in which such ownership is likely to be realized in the program performance of the station. In this regard, the record does show that Messrs. Jones and Bryant will have limited responsibility for some areas of programming. Thus, the minority ownership of Messrs. Jones and Bryant is likely to increase diversity of content, especially of opinion and viewpoint. See *TV 9, Inc.* v. *FCC,* 495 F 2d 929, 938 (D.C. Cir. 1973), rehearing denied 495 F 2d 941, cert. denied 419 U.S. 986 (1974). See also *Garrett Broadcasting Service* v. *FCC,* 513 F 2d 1056 (D.C. Cir. 1975); *Flint Family Radio, Inc.,* 69 FCC 2d 38 (Rev. Bd. 1977); *Bartell Broadcasting of Florida, Inc.,* 45 RR 2d 1329 (1979) and *New Continental Broadcasting Company,* 88 FCC 2d 830 (Rev. Bd. 1981). While part-time participation cannot be found insofar as Messrs. Jones and Bryant are concerned, some moderate comparative credit or merit will be afforded based on the record showing and this merit is enhanced by local residence and in the case of Jones by extensive participation in civic activities.[50] Of the integrated stockholders, Robert Kiley (full-time) and Bryant and Jones (5–10 hours per week), all are local residents of Indianapolis. The remaining shareholders are also local residents. However, none will participate in station affairs. Thus, their participation in the substantial full-time operation of the station is non-existent and no credit is allowed. *Policy Statement,* 1 FCC 2d at 396; *Enterprise Broadcasting, Inc.,* 56 FCC 2d 352, 355 (Rev. Bd. 1975). With respect to Bryant and Jones, no integration credit will be afforded as such since their participation does not qualify for part-time. However, this will be considered under the minority merit and the merit will be comparatively enhanced by their participation.

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[49] Ms. Phillipa Wyatt is a Black woman. However, she will not participate in the day-to-day operation of the station and even her position as Director is limited in order to isolate from a possible conflict because of her operation of an advertising business.

[50] RCCI also seeks minority credit for Ms. Wyatt, a Black woman, however, she will have no active day-to-day role in the station on even less than a part-time basis and no credit or merit is allowed. Further, it is noted that Ms. Wyatt is in the advertising business and thus is responsible for part of a diversification demerit for RCCI considered *infra.*

Diversification of Ownership of Media of Mass Communication

30. Two specific areas must be considered under the diversification criterion - namely, advertising agencies and CATV interests both of which are involved and both are located in the Indianapolis area.

31. Roger Kiley, the brother of Robert Kiley, is a 5.5% owner and Director of RCCI and is also a 22% shareholder of the Kiley, Miller & Bain advertising agency in Indianapolis. Phillipa Wyatt, another 5.5% owner and Director of RCCI is the sole owner of the Wyatt advertising agency. RCCI has proposed policies and regulations which it represents are designed to insure that all advertising agencies and commercial accounts would be treated fairly. However, whether such policies can neutralize the possible conflict of interest is not so clear. For example, Roger Kiley and Wyatt must announce their ownership interest in RCCI to all their clients and this could exacerbate the potential conflict of interest. Further, Roger Kiley and Wyatt while named Directors of RCCI, will not be privy to certain important commercial information and cannot participate in such decisions. Thus, while the safeguards represent perhaps the most that can be expected where the two owners plan to continue their activities in the advertising agency business, the safeguards do not completely ameliorate the potential conflict of interest which is presented by overlapping ownership of advertising agencies and the proposed broadcast facility. *Mid-Florida Television Corp.*, 69 FCC 2d 607, 649 (1978).

32. Next, the question of CATV interests is presented. Both Messrs. Bryant and Doninger are each 5.5% stockholders in RCCI and also have a combined 2.4% interest in the franchise of cable television systems which are located within the service area of the proposed RCCI facility. Both Bryant and Doninger are limited partners and neither Bryant nor Doninger have been shown to have any meaningful control over Indianapolis Cable Co. Ltd. Accordingly, there exists only the mere ownership in CATV through a limited partnership interest. Such interest is inconsequential. See *Anax Broadcasting, Incorporated*, 87 FCC 2d 483, 488 (1981). However, the advertising agencies in which RCCI stockholders Roger Kiley and Phillipa Wyatt are connected do warrant a slight demerit for diversification. There will be economic competition for the advertising in the same market, and, in addition, the two involved Directors of RCCI will have their authority curtailed because of this.

33. A key question in the consideration of RCCI is the qualitative preference which Kiley claims for his past broadcast experience. Most of Kiley's past broadcast experience is as the General Manager

of WIFE. It has previously been determined that such involvement at WIFE, based on the findings and conclusions under Issue 1, dictate a substantial demerit, but, not considered to be an absolutely disqualifying one. Clearly and but for the findings and conclusions in Issue 1, Kiley would receive a substantial credit for his broadcast experience (1959 to 1976) most of which was at the management level. However, Kiley was found to have had a direct involvement in the so-called Hartke matter and a direct involvement in the intimidation and harassment of Ron Mercer. Also, but for the passage of time since those events occurred, they would have supported a conclusion of absolute disqualification of the RCCI applicant. RCCI argues that the credit here claimed for Kiley does not deal with past broadcast record of Kiley since he was not the licensee of WIFE. Rather, it concerns only his experience. It is pertinent here to note that Issue 1 in this proceeding is not in terms of either past experience or past record, but, rather that Kiley's "involvement" with WIFE be considered on the basic and/or comparative qualifications of RCCI. Thus, Kiley's past broadcast experience must be viewed in the light of his involvement at WIFE. Kiley further seeks to enhance his experience by his claimed record of meritorious local live public interest programming which he takes credit for and substantial civic activities in the community. However, Kiley cannot seek the benefits of his experience without also assuming responsibility of the burdens which accompany those benefits. It is concluded that the nature of the burdens as found in Issue 1 are of such a substantially serious nature to substantially erode any claim by Robert Kiley that he receive a qualitative preference for past broadcast experience.

34. The findings and conclusions on Issue 1 also must be considered in Kiley's preference claim for substantial civic participation. Such activity on Kiley's part is sharply called into question since it covers a period of time while he was employed at WIFE during a period when the station was under constant threat of possible loss of its license. During this period of time, WIFE and Kiley, whose economic future was then tied to WIFE, were clearly motivated by the licensee's desire to do everything possible to upgrade its posture before the Commission. With this background, it is not possible to accept Kiley's civic involvement as an indication of future conduct and thus his otherwise substantial record of civic involvement is likewise eroded. *Oil Shale Broadcasting Co.*, 52 FCC 2d 1167, 1169 (Rev. Bd. 1975); *Trans America Broadcasting Corp.*, 20 FCC 2d 568, 571 (Rev. Bd. 1969) and *Midwest Radio-Television, Inc.*, 18 FCC 2d 1011, 1014 (Rev. Bd. 1969).

35. Kiley does, however, retain his credit for local residence and it should be observed that since Kiley terminated his association with WIFE and Don Burden, there has been no showing on this record that Kiley has engaged in any sharp or unlawful practices

which would cause additional concern as to Kiley's record. In summary, Mr. Kiley, a 61.11% stockholder, will be the only person with ownership interest fully integrated on a full-time basis into the day-to-day operation of the proposed station. In addition, a slight demerit is found on diversification because of the advertising interests of two of the stockholders and Directors of RCCI. Such merit credit as can be allowed for minority ownership is considered *infra*.

Mediacom

36. Mediacom consists of eight shareholders, none of whom has any ownership interest in any other mass communication medium. Mr. Weir does have a 100% ownership interest in Ad Lib, an advertising agency in Indianapolis. However, the record supports a conclusion that Mr. Weir will transfer all accounts to Mcquade Bloomhorst, without compensation and he will have no ties with any other advertising agency should Mediacom be the successful applicant.

37. The critical examination for Mediacom concerns the credit which can be given for integration purposes. Mediacom seeks to claim 63.63% integration which is computed as follows based on irrevocable voting proxies:

James E. Weir		22.73%
George P. Sweet		18.18%
Heidi E. Mandich		11.36%
Robert H. Bernard		11.36%
	Total	63.63%

As indicated in the findings of fact, Weir, Mandich and Bernard proposed to devote full-time and Sweet 20 hours a week. Thus, by the vehicle of the voting rights arrangement, i.e., the assignment of absolute voting rights until 1997, Mediacom seeks to increase its quantitative integration credit from 28.41% to 42.45%. When this 42.45% is then combined with that of the part-time (20 hours) integrated stockholder - Sweet - the proposed four full-time and one part-time owners claim 63.63% of the voting rights. Thus, the question is presented whether consideration must be given to the voting rights which place integrated stockholders in control who at the same time do not have true ownership in terms of the total investment and control of only three of eight seats on the Board of Directors.

38. The Commission has held that in determining the control of a corporation, Mediacom in this case, it will look beyond the mere legal aspects in order to determine whether other parties may lend dominance to parties who normally do not have controlling interest. *WWIZ, Inc.*, 36 FCC 561 (1964), *aff'd sub nom Lorain Journal Co.* v.

FCC, 351 F 2d 824 (D. C. Cir. 1965). The *WWIZ* case recognized that control need not be legal control in the formal sense but may consist of actual control by virtue of the special circumstances presented, i.e., control is every form of control - actual, legal, direct, indirect, negative or affirmative. See 36 FCC 561 at 604. Section 308(b) of the Communications Act requires that a determination be made of the qualifications of the applicant to operate the station. Thus, the Commission looks beyond the corporate form to (a) the identity and other characteristics of the individuals comprising a corporate applicant and (b) the actual and true ownership of an applicant company. *Henderson Broadcasting Company*, 63 FCC 2d 419, 424 (Rev. Bd. 1977) and *Berryville Broadcasting Co.*, 70 FCC 2d 1 (Rev. Bd. 1978). Here it is clear that the four so-called investing non-integrated stockholders have put up $172,000 and hold a total of 54.56% of the stock. The other four stockholders including Mr. Sweet have put up a total of $31,200[51] for 44.46% of the stock. Yet through the irrevocable voting rights, the minority has 63.63% of the votes, which by agreement, the minority stockholders hold until the year 1997.

39. A determination of this matter must consider all relevant facts relating to *de jure* and *de facto* control. Such facts include the initial organization of the company, the initial stock plans, subsequent revision of stock plans, the duration of the relationship between the investing and full-time integrated shareholders, the sources of financing, the financial control of the applicant as well as its funds. See *Henderson*, supra. The majority owners of Mediacom are clear in terms of total investment and control of the Board of Directors. They are Messrs. Kuhn, Bradley, Lamb and Poole, none of which will be integrated into the proposed station.

40. Some history of the stockholders may be helpful. The formation of the Mediacom application was Messrs. Weir and Sweet. Sweet then recruited the so-called investing stockholders - Kuhn, Bradley, Lamb and Poole. Weir was responsible for bringing into the corporation Bernard and Mandich. At that time, the investing stockholders would control 71.59% of the stock and the so-called investing stockholders held five of the six positions on the Board of Directors. After the Mediacom application was filed, Mandich and Bernard were elected as Directors and the voting rights amendment was filed which resulted in the Mandich and Bernard voting rights being doubled and Weir's voting rights increased by one-third. This provided the total voting rights to Mandich, Bernard and Weir of 42.45% for a paid-in capital of $5,000 or 2% of the total investment. The five investing stockholders made total investments of almost $200,000 or 98% of the invested capital. While the stockholders with

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[51] Excluding Mr. Sweet, the total investment of the other three integrated stockholders totals only $5,000.

the minimal investment are given various titles indicating management responsibilities, no mention is made of any required financial responsibility to the corporation (Mediacom Exhibit 2; Mediacom Exhibit 10, pp. 1–2). Thus, assuming that the majority of the voting rights have been passed to stockholders with comparatively little investment, the investing stockholders still control the finances, have 54.54% of the stock and have five of the eight seats on the Board of Directors.

41. The investing stockholders also have the power to remove from office one or more of the full-time integrated stockholders, with or without cause at anytime (Tr. 927–28; RCI Exhibit 4, pp. 23–25). "It is well known that one of the most powerful and effective methods of control of any business, organization, or institution, and one of the most potent causes of involuntary assignment of its interests, is the control of its finances." See *Hertmeyer* v. *Federal Communications Commission*, 95 F 2d 91, 99 (D.C. Cir. 1937).

42. It thus appears that the *de facto* control of the so-called investing stockholders, through the retention of financial control and right to remove from office could effectively override any *de jure* control and places in question the entire Mediacom integration proposal.

43. The Commission looks to the stations' proprietors who actively participate in the day-to-day operation of the station since this provides a likelihood of greater sensitivity to an area's changing needs and programming designed to meet those needs. See *Policy Statement*, 1 FCC 2d at 395.

44. In effect, Mediacom has executed a facade through its voting rights proposal which will substantially improve Mediacom's integration credit and indirectly permit the investing stockholders - those who have put up 98% of the funds - to receive integration credit when these investing stockholders do not propose to participate in the day-to-day operation of the station. Such enhancement of the Mediacom integration allowable credits cannot be allowed. See *Henderson*, *supra* at 426 and *Alvin L. Korngold*, 45 FCC 2d 1, 4 (Rev. Bd. 1974).

Allowable Integration for Mediacom

45. Three of Mediacom's principals are proposed to participate in the management and operation of its station on a full-time basis. The three are James E. Weir, Heidi E. Mandich and Robert H. Bernard, who collectively own 28.14% of the Mediacom stock.

46. Mediacom is entitled to integration credit for the full-time integration of Mr. Weir, a 17.05% stockholder. Weir's broadcast experience includes one seven-month period of management responsibility over 14 years ago. Other periods in prior broadcasting experience were devoted to sales positions and no management experience is indicated. Mr. Weir has had some involvement in civic

affairs in the past but these seem to be primarily related to the advertising and building business which are related to his occupation.

47. Ms. Heidi E. Mandich (5.68%) has stated her intent to work full-time at the proposed station. However, this is somewhat diluted by a lack of any commitment on Ms. Mandich's part to resign her present position with WISH-TV. However, the record does contain uncontradicted evidence that Ms. Mandich will devote full-time to her respective duties at the station. The cases cited for the fact that full-time credit cannot be made absent a solid basis for a finding that the owner would spend the stated time at the station are rejected[52] and do not support a basis for rejecting the Mandich claim for full-time. The cited cases deal with in extremis situations. For example, the *Flint* [53] case concerns an individual who proposed to work 70 hours a week, seven days a week for $5,000 and had a wife and four children to support. Thus, Ms. Mandich will be given credit for full-time participation. This factor is not entitled to any enhancement since both the past broadcast experience and civic participation is limited.

48. Mr. Bernard is another Mediacom 5.68% stockholder and he is afforded credit for full-time participation and is also given credit for broadcast experience, although such experience appears to have ended in 1973. Mr. Bernard is also entitled to an enhancement factor for his civic affairs and he is a Black which will be considered *infra.*

49. Mr. Sweet will devote 20[52] hours a week to the proposed station. This affords some slight integration credit under the *Policy Statement.* See *Alexander S. Klein, Jr.*, 69 FCC 2d 2134, 2146 (Rev. Bd. 1978). Mr. Sweet's ability to devote this 20 hours a week to the station was extensively examined in the hearing. Other applicants would conclude that Sweet lacks the means to arrange his business interests in such a way that he would be able to devote the 20 hours a week to Mediacom. However, it is concluded that Sweet has satisfactorily demonstrated the sincerity or practicality of his proposal and the record contains no factual basis on which to doubt Mr. Sweet's proposal. There is a suggestion that anyone in the construction business, as is Sweet, would be able to see the transparency of Sweet's proposal. No conclusion can or will be made based on a presumption or suggestion of the time demands of the construction business. If the nature of the construction business makes uncompromising demands on the time of those engaged in this business, it should have been shown on the record. Mr. Sweet did show plans for reducing the time spent at his present principal

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[52] Twenty hours a week is an appropriate cut-off point for determining whether part-time employment would be considered in the applicant's integration proposal. *Midwest Broadcasting, Inc.*, 45 RR 2d 1 (Rev. Bd. 1979).

[53] *Flint Family Radio, Inc.*, 69 FCC 2d 38 (Rev. Bd. 1977).

business. Mediacom's proposal for Mr. Sweet has not been shown to be inherently implausible, *Prattville Broadcasting Company*, 5 FCC 2d 661 (Rev. Bd. 1966).

50. The Mediacom proposal that it be afforded 63.63% integration credit is premised upon three assumptions: (1) Mediacom voting rights be given full force and effect; (2) the proposed full-time participation of Mediacom shareholders, Weir, Mandich and Bernard are fully credited and (3) the 20-hour a week proposal of Mr. Sweet is given integration credit equivalent to that of a full-time participant in station operations. The proposal of Sweet for 20 hours a week is found feasible but such proposal is entitled to ". . . some but not much credit under the policy statement . . ." *Alexander S. Klein, Jr.*, 69 FCC 2d 2134, 2146 (Rev. Bd. 1978).

51. The percentage of actual stockholder ownership will control rather than the percentage of voting rights held. The maximum allowable integration credit is computed as follows:

Integrated Stockholder	*Actual Percentage of Ownership*	*Percentage of Voting Rights*
James Weir (full-time)	17.05	22.73
Heidi Mandich (full-time)	5.68	11.36
Robert Bernard (full-time)	5.68	11.36
	28.41	45.45

Thus, Mediacom can be given credit for three stockholders who collectively own 28.41% of the stock who also will devote full-time to the day-to-day operation of the station. Even if these three stockholders are afforded the full benefit for the voting rights the percentage would be raised to 45.45% - still short of control. Mr. Sweet is entitled to some slight credit for his part-time (20 hours) participation in the operation of the station. Mr. Sweet has 17.05% actual ownership which through the voting rights agreement is increased to 18.18% of the stock voting rights. Mediacom seeks to claim Mr. Sweet as entitled to full-time integration which, in turn, supports its claim of 63.63% of the voting rights on an integrated basis. However, as previously indicated, the voting rights cannot be accepted since the financial control and all that this implies remains with the non-integrated investing stockholders. Thus, the most that Mediacom can claim is 28.41% integration on a full-time basis which is only slightly increased because of Mr. Sweet's part-time participation. Credit can only be allowed for true actual ownership. See *Sunbeam Television Corporation*, 38 FCC 805, 807-08 (1965) and *Henderson Broadcasting Company*, 63 FCC 2d 419, 426 (Rev. Bd. 1977).

RCI

Integration of Ownership and Management

52. Only Mr. Gradison who owns 51% of the stock of RCI is proposed to participate in the day-to-day management of RCI's station. Other applicants (Peoples and ICC) have challenged Gradison's claim of devoting 40 hours a week to the station in view of his many other business activities, citing *Blancett Broadcasting Co.*, 17 FCC 2d 227, 230 (Rev. Bd. 1969) and *Flint Family Radio, Inc.*, 69 FCC 2d 38, 40, 41 RR 2d 1155, 1159 (Rev. Bd. 1977). However, the record demonstrates that Mr. Gradison has led an active business life starting at the age of 12; that his California ventures have been terminated and that the affairs of his real estate ventures and record company are now arranged so that he will be able to spend the 40 hours a week as claimed. Accordingly, it is concluded that Mr. Gradison has demonstrated his ability to devote 40 hours a week to the station. Based on the facts of this case, the *Blancett* and *Flint* cases are inappropriate. *Blancett* involves professional and businessmen that plan to continue their principle occupations and means of livelihood while devoting part-time to the radio station. *Flint* involved persons with existing full-time employment who proposed to add on to their work week many additional hours at the radio station, plus substantial commuting time, without demonstrating how they could manage to do so on a continuing basis. Here, Gradison has demonstrated what activities he has terminated and how the remaining workload will be altered to accommodate full-time at RCI.

53. It is also concluded that Mr. Gradison has demonstrated a wide ranging interest as a civic leader and volunteer worker in Indianapolis where he also makes his residence. Gradison has obtained broadcast experience while a full-time college student, working at a student-operated station at Brown University during the years 1960–1964. It is concluded that such experience being remote in time, is of no decisional significance.

Diversity

54. Other parties have raised a number of arguments which would support a diversity demerit being assessed against RCI. The Commission policy is to encourage diversity in the ownership and control of media of mass communication to the general public. See *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 394–95 (1965).

55. It is alleged that Gradison's ownership interest in a record company should be a basis for the demerit on diversity. This argument is rejected. The Commission's primary application of this Policy has been to interests in radio, television and print media of general circulation. When the Commission has dealt with other

collateral interests such as motion picture exhibition, the concern is with the "dissemination of ownership viewpoint". *La Fiesta Broadcasting Co., et al.*, 6 FCC 2d 65, 75 (Rev. Bd. 1966). Because of the limited impact of motion picture exhibition and other collateral interests in the dissemination of ownership viewpoint, such interests are rarely, if ever, of decisional significance as the Review Board has noted. *Barnes Enterprises, Inc.*, 69 FCC 2d 1957, 1962 (Rev. Bd. 1979). No prior case has been cited where ownership of a record company is considered to be of "diversity" significance or consequence. The impact of the record company on the varied music format is found *de minimus* and the impact of the company's output of records, on the dissemination of words, thoughts and ownership viewpoint to members of the general public, is found to be infinitesimal.

56. The opposing applicants also raise in their proposed conclusions the argument that privity exists between Mr. Simon and Mr. Gradison so that the Simon's broadcast interests should be charged to Gradison under the diversity factor. The Presiding Judge has ruled that the threshold showing has not been made (Tr. 1021–22, 1071–72). That ruling stands. The principle case cited by opposing applicants is *Fisher Broadcasting Co.*, 18 RR 369 (1958) which concerns a cross interest in a comparative proceeding for a new VHF television station in Portland, Oregon where one of the applicants was the joint owner of a television station in Seattle with individuals who owned the existing Portland television station. All television stations were VHF facilities. Thus, the *Fisher* case involved indirect ties of common ownership relative to two VHF stations in the same market. No case has been found where the Commission has considered the privity as exists in this case between Messrs. Simon and Gradison as a basis for a diversity demerit. The record shows no privity between Simon and Gradison which in any way deals with Simon's ownership interest in WIFE(AM). Other cases in this question deal with a direct cross interest relationship between or with broadcast facilities. See *Golden West Broadcasters*, 16 FCC 2d 918 (1969); *K & M Broadcasters, Inc.*, 19 FCC 2d 947 (1969); *KFRM, Inc.*, 5 FCC 2d 348 (1966) and *Lexington County Broadcasters, Inc.*, 42 FCC 2d 581 (1973). A comparative demerit was assessed where a principal of an applicant for a broadcast facility in a given community would also engage in an advertising business in the same community. See *Mid-Florida Television Corp.*, 33 FCC 2d 1, 10 (1972). However, the trend now appears to be that the business relationship, as existed between Simon and Gradison, does not warrant a cross interest issue. See *Prairieland Broadcasters, et al.*, 48 FCC 2d 650 (1974).

57. An additional argument advanced for assigning a diversity demerit to RCI is the position of Dean Boyd as an elected member of the Indianapolis City Council which, among other duties, licenses CATV facilities. This argument is rejected. The Commission's

diversification policy deals with ownership or control in the entrepreneural sense, i.e., those who make decisions relative to the content of communications that are disseminated to the public. Such powers are not a right of a city council member, because of Constitutional and statutory limitations on the abridgement of freedom of speech. Thus, an attempt to charge a city council member who also has an ownership in RCI with possible CATV interests would be a new and unique application of the diversity demerit.

58. RCI proposes to integrate only one of its six stockholders, 51% owner, Mr. Gradison, on either a full-time or part-time basis. RCI seeks to enhance its integration proposal by urging that the integration of but a single shareholder is a plus factor since this integration represents control of the corporation. RCI cites in support of this claimed enhancement factor *Pleasant Broadcasting Co.*, 40 FCC 2d 582, 587 (1973) which holds that between two applicants, the one which "proposes to integrate a majority of the stockholders into the operation of the station should be preferred." The *Pleasant* case deals with a different fact situation, i.e., one applicant had 38% integration while the other had 55%. The Board found that while the difference in ownership was not substantial, the 55% constituted a majority of ownership and was entitled to a preference. RCI will be afforded 51% integration of ownership, but, having so found it will not be afforded a further enhancement of this conclusion. Thus, to the extent that 51% stock ownership constitutes a bare majority, it will be considered. Otherwise, a double enhancement would result based on a case citation which does not apply to the facts in this case. Gradison is entitled to a qualitative enhancement for his local residence and civic participation.

59. The conclusion reached herein will be considered *infra* in assessing the comparative qualifications of all five applicants. The question of minority preference will also be considered *infra* since each applicant has some degree of minority participation.

ICC

60. First the claims of ICC that Walk's past broadcast record is entitled to credit is considered. No credit for such past broadcast record is allowed. The *Policy Statement* makes clear that ICC is entitled to minimal credit for Walk's past broadcast record where he does not propose to participate in the station on a permanent basis. Thus, even an extraordinary record "compiled while the owner participated in the operation of the station will not be accorded full credit where the party does not propose similar participation in the operation of the new station for which he is applying". 1 FCC 2d at 398. Walk testified that he had direct responsibility for the day-today operations of WAMO (AM and FM) (Tr. 1251), the station on which ICC primarily relies for its claim of credit. In this instance, Walk will manage ICC's proposed station on an absentee basis. In

any event, Walk's record of past promise to the Commission on programming does not meet the actual performance and the broadcast record must be disregarded.

Integration

61. Only Mr. Gusky, who holds the option to purchase up to 9.1% of the ICC stock is proposed to participate on a full-time basis. Mr. Gusky's credit under the integration of ownership and management is not enhanced by local residence or civic involvement. Mr. Gusky does propose to move to Indianapolis should ICC be the successful applicant. Gusky has had previous broadcast sales management experience, but such experience limited to sales does not offer more than a slight enhancement of the integration credit.

62. It is the ICC proposal that all of its stockholders, excluding Gusky, who now holds only the option to purchase about 9% of the stock, propose to participate on a part-time basis. The question, however, is whether ICC can be given any credit for the type of part-time participation proposed. Three of its principals will devote less than 20 hours a week in the operation of the station. Nichols will devote four to eight hours per week; Malad will devote two to five hours per week and Bush[54] 10 to 15 hours per week. ICC is not entitled to credit for such *de minimus* participation in the day-to-day operation of the station. See *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d at 395–96 (1965); *Radio Gaithersburg, Inc.*, 72 FCC 2d 821, 828 n. 8 (Rev. Bd. 1979) and *Midwest Broadcasting Company*, 70 FCC 2d 1489, 1494–95 (Rev. Bd. 1979).

63. ICC has another group of principals who will devote time to the proposed station based on an overall yearly average of 20 hours per week for Mr. Roller and 25 hours per week for Mr. Drane.[55] Mr. Roller would devote larger amounts of time to the station during the off-season in his capacity as a sales representative for women's apparel. Drane's proposal is predicated on concentrating his time at the station during school vacations from his position as Dean of Boys. It can be concluded that during a major part of the year, both Roller and Drane will spend less than 20 hours a week at the station. Such proposals do not insure the type of day-to-day responsibilities involving managerial and policy functions for which credit is contemplated in the *Policy Statement*. See 1 FCC 2d 395–96. Thus, the proposals of Roller and Drane will be fulfilled with the majority of their commitment being at less than 20 hours per week and no credit can be given to such proposals. See *Policy Statement*, 1 FCC 2d at 395–96 and *Radio Gaithersburg, Inc.*, 72 FCC 821, 828 n. 8.

64. Messrs. Zebrowski and Duchon do propose to devote 20 hours

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[54] Dr. Busch's position as a minority will be considered *infra.*

[55] Mr. Drane is a Black and this will be considered *infra.*

per week to the proposed station. However, their duties involve participation in the Financial Review Committee plus involving the station in the community, securing groups for public service programming and assisting the sales department by contracting business acquaintances. While the 20 hours a week can be credited as part-time, it is not clear if the duties of Zebrowski and Duchon involve management responsibility. Thus, there is insufficient information to conclude that the integration would be meaningful. *Blancett Broadcasting Co.*, 17 FCC 2d 227, 230 (Rev. Bd. 1969). Therefore a slight credit will be afforded to ICC for the part-time participation of Zebrowski and Duchon. *Blancett Broadcasting, supra*and *Policy Statement*, 1 FCC 2d at 395–96.

65. Since the proposed participation of Nichols, Malad, Busch, Roller, Drane, Zebrowski and Duchon do not appear to constitute cognizable integration of ownership and management, under the Policy Statement, only slight credit is given to ICC for the civic involvement of their individuals. *Policy Statement*, 1 FCC 2d at 395–96; *Henderson Broadcasting Co., Inc.*, 63 FCC 419 427 n. 13 (Rev. Bd. 1977); *Midwest Broadcasting Company*, 70 FCC 2d 1499, 1497 and *Radio Gaithersburg, Inc.*, 72 FCC 2d 835, 840 n. 5.

66. Leonard Walk proposes to devote actual full-time management participation to the proposed station during the initial three months of operation. For the next six months, Walk would devote ten days a month at the station. After this, he would devote three days a month in Indianapolis. Thus, after about nine months of station operation, Walk would be discharging all his day-to-day management activities from his home in Pittsburgh with the qualification, that, should an emergency arise, he would devote any additional time required and keep in daily touch with the General Manager. The question is thus presented whether the Walk proposal for his management activities can be regarded as a meaningful convergence of ownership and management which would merit significant weight under the *Policy Statement, WVOC, Inc.*, 45 FCC 2d 420, 422 (Rev. Bd. 1974). It appears that Walk has previously managed stations on this type of absentee basis, but this does not enhance the nature of his proposal. A permanent on-the-site presence is the element lacking and thus the Walk proposal for integration of ownership and management is entitled to only slight credit. *Policy Statement*, 1 FCC 2d 393, 395 n. 6; *Theodore Granik*, 8 FCC 2d 1068, 1077–78 (Rev. Bd. 1967); *Henderson Broadcasting, Co.*, 63 FCC 2d 419, 420–21 (Rev. Bd. 1977); *Alvin Korngold*, 45 FCC 2d 1 (Rev. Bd. 1974); *Farragut Television Corp.*, 5 FCC 2d 93, 96–98 (Rev. Bd. 1966) and *Gainesville Media, Inc.*, 70 FCC 2d 58, 56 (Rev. Bd. 1978). This being the case, the conclusion is also reached that the past broadcast experience of Walk is entitled to only slight credit.

Diversification of Ownership of Media of Mass Communication

67. Mr. Walk is Chairman of the Board and a 5% owner of Dynamic Cablevision, Inc., which holds cable television authorizations in Dade County and Hialeah, Florida and he also has certain consulting work with other stations, none of which are in the Indianapolis market. Mr. Walk has explained his position that he will take no consulting in the Indianapolis market. However, in reviewing all such agreements, there is no basis for concluding that any ownership attribution arises out of any such agreements and no demerit can be assigned to ICC on this basis. There is the ownership interest of Walk in a Florida CATV company but no diversification demerit will be awarded for the remote 5% interest. The other element for diversification consideration is the fact that Dr. Mary E. Busch is a member of the Indianapolis Board of School Commissioners which is the licensee of Station WIAN in Indianapolis. Dr. Busch has no ownership interest in Station WIAN and it is a non-commercial educational station. No case has been found where this type of connection with another radio station is cognizable under the diversification criteria.

68. The overall consideration of ICC must also take into account the resolution of Issue 2 relative to the comparative qualifications of ICC. The failure to report essential information on Mr. Zebrowski was found under Issue 2 to be a basis for a comparative demerit. Since it was not found to be an intentional withholding of information, the comparative demerit assigned to ICC under Issue 2 is found to be slight.

Minority Interests in the Applicants

69. The argument has been advanced in the proceeding that each of the five mutually-exclusive applicants include minority interests, and, thus this factor would cancel out, in that all applicants are entitled to an equal merit. Since there are degrees of participation by minorities in each of the applicants, those differences in degree are examined.

Peoples Broadcasting Corporation

70. Peoples will have a Black woman - Ms. Jubert - with a 2.5% ownership of the Peoples stock. She will also be an officer and Director of Peoples and will devote full-time to the proposed station as the Operations Director. This coupled with Ms. Jubert's local residence and civic participation offers a substantial likelihood that her ownership interest and management function is likely to increase diversity of content and viewpoint. Thus, in addition to the integration credit afforded to Peoples based on Ms. Jubert's full-time participation, a substantial merit is also added for her status as a Black woman.

Radio Circle City Incorporated

71. RCCI proposes to have two Black males - Messrs. Jones (5.55%) and Bryant (5.55%) and one Black female - Phillipa Wyatt (5.55%). Mr. Bryant will be both an officer and Director of RCCI while Mr. Jones and Ms. Wyatt will be Directors of the corporation.

72. Ms. Wyatt's status as a minority will be entirely discounted. She will have no part in the day-to-day operation of the station. Her ability to function as a Director of RCCI will be limited by the attempts of RCCI to isolate Ms. Wyatt from certain areas of corporate decisions because of her ownership of an advertising agency in the Indianapolis area. Messrs. Jones and Bryant do propose to devote five to ten hours a week to the station. Again, as with the case of Ms. Wyatt, the minority ownership interest in RCCI does not approach a controlling interest. Nevertheless, both Messrs. Jones and Bryant will be responsible for some program input should RCCI be the successful applicant and therefore RCCI is entitled to a merit credit. While no credit at all can be allowed under the standard integration criteria since both will work less than 20 hours a week, a moderate merit or qualitative enhancement for minority participation can be considered in situations where otherwise no integration credit would be given.

Mediacom

73. Mediacom proposes the full-time integration of Mr. Bernard, a 5.68% stockholder. He is a local resident and he will work both on sales and public affairs programming for Mediacom. As previously indicated, the stock voting proxie arrangement whereby Mr. Bernard's 5.68% interest would be increased to 11.36% has been rejected. Nevertheless, Mr. Bernard is a substantial resident of the community and has participated in a number of its affairs. This coupled with his proposed full-time participation affords Mediacom a substantial merit preference in addition to the credit previously afforded Mediacom for Mr. Bernard's full-time participation.

Radio Corporation of Indiana

74. RCI proposes to have two Blacks in its organization—Mr. Rozelle Boyd (7.25%) and Ms. Fay H. Williams (7.25%). Both will be Directors of RCI. However, they will take no part in the day-to-day operations of the station, other than at Board meetings where it is represented programming will be discussed. Other than such participation, they will listen to the radio station. While this can have some impact on the diversity of content of the station, its total impact is minimal especially when compared to a weekly and full-time participation. Thus, the merit awarded here is but slight.

Indianapolis Communications Corporation

75. ICC proposes two Blacks as a part of its organization—Ms. Mary E. Busch (6.9%) and Mr. Ligon W. Drane, Jr. (2.3%). Ms. Busch will devote 10–15 hours a week to the station and Mr. Drane 25 hours a week on a non-regular basis. Under the standards neither Ms. Busch nor Mr. Drane can be credited with even part-time participation in the station's day-to-day activities. It has previously been found that Drane does not propose to devote time on a regular basis to the station. Rather, it will be only during certain times of the year, i.e., during slack times in his regular employment. Both Ms. Mary Busch and Mr. Drane's ownership and participation in the station on the limited basis proposed do afford ICC a slight merit for their association with the proposed station.

76. Of the five applicants, only two propose to have a full-time minority ownership interest, namely, Peoples through Ms. Jubert (2.5%) and Mediacom through Mr. Bernard (5.68%). While Mr. Bernard's ownership interest will be approximately twice that of Ms. Jubert, each has a small minority ownership interest and a substantial merit credit of a like nature will be awarded to these two applicants.

77. Applicants RCCI and ICC will each be represented by two Black ownership interests. Some time will be devoted by such Black owners to the operation of the station, but short of the time required to give credit for either part-time (20 hours) or full-time (40 hours) credit. Of the two applicants, ICC's two Black owners will devote slightly more time to the station than the Black ownership of RCCI and thus while all four Black owners are prominent members of the community, the additional time at the ICC station offers greater likelihood of increased diversity of content and viewpoint, and thus the ICC credit will be rated superior to that of RCCI.

78. The lowest merit rating will be afforded to RCI which also will have two Blacks with ownership interest (7.25% each) but neither will participate in the operation of the station. Participation at Director's meetings cannot be equated on a comparative basis with other applicants who have minorities that will in varying degrees be active in the operation of the station. No credit is afforded in this case because a Black with ownership interest will listen to the station on a regular basis.

79. It is recognized that in the area of minority ownership where each of five competing applicants are seeking additional credit for minority ownership, the Presiding Judge has utilized the tests normally applied where non-minority integration is considered. To the extent that this may result in a double merit or credit preference to who have proposed full-time integration of Black ownership, such double credit or merit results from application of the Commission's policy and case law on minority ownership. See *TV 9, Inc.* v. *FCC*,

495 F 2d 924 (1973), *cert. denied* 418 U.S. 986 (1974); *Garrett Broadcasting* v. *FCC*, 513 F 2d 1056 (1975) and *Statement on Minority Ownership of Broadcast Facilities*, 68 FCC 2d 979 (1978).

Ultimate Conclusions

80. Each of the five applicants propose to install auxiliary power equipment to assure continuous operation of the station in the event of a power failure. Thus, each applicant will receive an equal preference.

Issue 1

81. Issue 1 has been resolved adverse to RCCI in that a substantial demerit is assigned due to Mr. Kiley's previous involvement in the operation of Station WIFE. This demerit will be evaluated in the final disposition of the applicant on a comparative basis in that it will substantially erode the qualitative preference for RCCI.

Issue 2

82. Issue 2(a) has been resolved on the basis of a summary decision favorable to ICC. Issue 2(b) permits a consideration of ICC's basic and comparative qualifications. It has been concluded that the facts demonstrate an absence of intent to violate any of the Commission's reporting requirements. However, there was a period of time when ICC's failure to report did provide insufficient and inaccurate information on the ICC financial proposal. The fact that this deficiency was later resolved by amendment does not erase ICC's original failure to report. A slight comparative demerit will be assigned to ICC.

Issue 3

83. Diversification has been found to be of primary significance in evaluating the comparative qualifications of applicants. See *Policy Statement*, 1 FCC 2d at 394. Many areas of a diversity have been considered in this proceeding such as motion picture theatres (Peoples), advertising agencies and CATV interests (RCCI), advertising agency (Mediacom), ownership in a phonograph record company, substantial financial dealings with the owner of another station in the same market, a city councilman who may have to vote on a CATV franchise (RCI) and CATV interests in a distant market, consulting work for other stations, and school board member ownership interest where school board is the licensee of a noncommercial educational station in the same market (ICC). Each of these diversification interests involving control of the media of mass communications has been dismissed as *de minimus* or inconsequential from a decisional standpoint except the advertising agency

interests of two of the minor owners of RCCI—Roger Kiley and Ms. Wyatt.[56] However, the demerit is found only to be slight. Since the demerit is slight, it does not form a basis for any final determination on the RCCI application.

84. Since the case cannot be resolved on diversification, the integration of ownership with management must be considered and thereafter such qualitative preferences or demerits for each of the applicants.

Applicant	*Quantitative*	*Qualitative*
Peoples	58% full-time 42% part-time	Moderate Substantial-Minority
RCCI	61.11% full-time	Slight Moderate-Minority
Mediacom	28.41% full-time (45.45% voting control)	Slight Substantial-Minority
RCI	51% full-time	Moderate Slight-Minority
ICC	9.1% full-time	Slight Slight-Minority

No applicant has a clear quantitative difference. The Review Board has noted that a "clear quantitative" difference could be found between comparative applicants where there is a difference of 12.5%. See *New Continental Broadcasting Company*, 88 FCC 2d 830, 850 (Rev. Bd. 1981).

85. The percentage difference between Peoples (58%) and RCCI (61.11%) is just over 3% with the next closest quantitative applicant—RCI—about 10% points behind RCCI. However, on a quantitative basis, two of the applicants can be eliminated—Mediacom[57] and ICC. The quantitative differences between Peoples, RCCI and RCI will thus be considered.

86. Peoples provides for family control through the Cantor family which includes both local residence and civic participation through one member of the family. There is no past broadcast

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[56] CATV interests were also involved with RCCI stockholders, Bryant and Doninger, but since this ownership is as limited partners, no demerit is found. See *Anax Broadcasting, Inc.*, 87 FCC 2d 483, 488 (1981).

[57] The reduction in the quantitative percentage allowed for Mediacom results from a rejection of the stock voting proxy arrangement which otherwise would have placed it with 63.63% quantitative integration interest.

experience represented by the Cantor family, but Andrew C. Johnston, with a 10% interest does have past broadcast experience. Efforts of Mr. Johnston to give added enhancement based on his broadcast record, based on the record, were not allowed. Peoples does, however, warrant a substantial additional merit as a full-time minority owner and by virtue of her local residence and civic participation which offers the real likelihood that her ownership interest and management function will be likely to increase diversity of content and viewpoint.

87. RCCI's case turns largely on the qualitative credit that can be allowed for Mr. Robert Kiley. He has been shown on this record to be a local resident, to have been active in civic activities and by far the most past broadcast experience at the management level. This coupled with his 61.11% ownership would otherwise dictate the selection of the RCCI application except for Issue 1 in this proceeding. Thus, the substantial qualitative credits which would otherwise accrue to RCCI are substantially eroded because of the findings and conclusions on Issue 1. Mr. Robert Kiley was found to have been involved while at WIFE which would be considered as absolutely disqualifying, but for the passage of time, on the absence of any showing on the record that such objectionable acts continued after he departed WIFE. To this also must be added the slight demerit for diversification as found *supra*. As with all five applicants, it does propose to utilize two minority owners—but not full-time. Accordingly, the qualitative credit allowed here is moderate, particularly when compared to Peoples who proposes to utilize the services of a minority owners full-time.

88. RCI will have a 51% owner integrated into the full-time management of the proposed station. This is enhanced by local residence and RCI seeks a further qualitative enhancement since the 51% ownership is represented in the one person who will work full-time. Thus, the argument is that one majority integrated owner is to be afforded additional enhancement over several minority owners who total a majority of the ownership control. Of the three applicants under consideration in this group, RCCI has a majority integrated owner with 61.11% control and clearly one family will control Peoples. Thus, no decisional difference can be found insofar as a majority integrated owner may be involved and the decision in the *Pleasant Broadcasting Co.*, case, *supra* are not found to be controlling here.

89. RCI's minority ownership integration is entitled to only a slight merit since there will be no participation on the day-to-day affairs of the station, other than listening to the station and thus its merit credit would rank last when compared to Peoples or RCCI.

90. In summary, the Peoples proposal will offer the best practical service to the public at Indianapolis and this application will be granted.

91. Accordingly, IT IS ORDERED, that unless an appeal is taken from this Initial Decision, or the Commission reviews it on its own motion, the application of Peoples Broadcasting Corporation (File No. BPH-9958) IS GRANTED and the applications of RCCI, Mediacom, RCI and ICC ARE DENIED.[58] [59]

BYRON E. HARRISON, *Administrative Law Judge.*

JOSEPH P. GONZALEZ, *Administrative Law Judge.*

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[59] Pursuant to the Order of the Chief Administrative Law Judge released October 29, 1981 (FCC 81M-3420), the word Judge will refer to Judges.

Common Carrier, Interstate
Mailgram
Telegraph Service

Memorandum Opinion and Order adopted authorizing the Puerto Rico Communications Authority to provide communication services between Puerto Rico and the U.S. mainland.
–Puerto Rico Communications Authority

FCC 83–28

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of PUERTO RICO COMMUNICATIONS AUTHORITY Application for authority, pursuant to Section 214 of the Communications Act, to acquire and operate facilities for the provision of record communications services between Puerto Rico and the United States Mainland.	File No. I-P-C-81–051

MEMORANDUM OPINION AND ORDER

(Adopted: January 20, 1983 Released: February 8, 1983)

BY THE COMMISSION: (COMMISSIONER JONES CONCURRING IN THE RESULT; COMMISSIONER FOGARTY ABSENT).

I. Background

1. On August 25, 1981, the Puerto Rico Communications Authority (PRCA) applied, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. §214, for certification and authorization to acquire and operate lines of communication between San Juan, Puerto Rico and New York, New York, in order to provide record communication services between the Commonwealth of Puerto Rico and the Continental United States.[1]

2. ITT World Communications, Inc. (ITT), RCA Global Communications, Inc. (RCA), TRT Telecommunications Corporation (TRT),

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[1] The term "Continental United States" was a term of art under old Section 222 of the Communications Act which was in effect when PRCA's application was filed. It was defined as "the District of Columbia and the States of the Union." As discussed *infra.*, this term was stricken when Section 222 was amended. We will treat the application as requesting authorization to serve the District of Columbia and all States and we will refer to these points as the "U.S. mainland."

Western Union International, Inc. (WUI) and Western Union International Caribbean, Inc. (WUI Caribbean) filed pleadings opposing the application.[2] PRCA filed a collective response to the oppositions to which all of the opponents replied.[3] In addition, the Puerto Rico Telephone Company (PRTC) and the Western Union Telegraph Company (Western Union) filed comments on specific issues raised in the oppositions.

II. The Application

3. PRCA is a public corporation operating as a private entity and offering common carrier voice and record services within Puerto Rico. Since its creation in 1942, PRCA has been authorized under local law as the sole carrier for record communications between points within Puerto Rico.[4] PRCA currently offers intra-Puerto Rico Telex and Mailgram services.[5] In order to provide Telex service to points outside of Puerto Rico, PRCA interconnects with the four international record carriers (IRCs) serving Puerto Rico.[6][7] In addition to providing interconnection for PRCA subscribers, three of the IRCs have their own subscribers and provide direct Telex service to the U.S. mainland through their respective operating centers in San Juan.[8] Mailgram service is not currently available between Puerto Rico and other points from any carrier.

4. PRCA now seeks to eliminate its dependence on the "middleman" IRCs for record traffic to the mainland. It requests authorization to offer its subscribers direct Telex service between Puerto Rico and the United States mainland. It also requests authorization to provide Mailgram service outbound from Puerto Rico to the U.S.

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[2] RCA filed comments in opposition to the application. ITT and TRT filed Petitions to Deny, and WUI and WUI Caribbean filed a joint Petition to Deny or Defer.

[3] WUI and WUI Caribbean filed a joint reply. In the text the joint opposition and the joint reply will be referred to as WUI pleadings.

[4] Law 212 of May 12, 1942, as amended.

[5] PRCA inaugurated its Telex service in February, 1967. From its inception, fully automatic exchanges have been operated at five principal cities: San Juan, Ponce, Mayaguez, Caguas and Arecibo. From these cities service is extended to virtually all municipalities. On March 1, 1981, PRCA inaugurated an Intra-Island Mailgram service like the Western Union service on the U.S. mainland. Messages are accepted from the public and transmitted over PRCA facilities to a computer and thence to terminal equipment located in the San Juan Serving Post Office. From there Mailgrams are placed into special envelopes by postal employees and delivered to the addressee by a postal carrier.

[7] As discussed *infra*, at *para.* 24, prior to passage of the Record Carrier Competition Act of 1981 (RCCA), which amended Section 222 of the Communications Act, Puerto Rico was treated as an international point for record communication services. Even after passage of the RCCA, the IRCs were authorized on an interim basis to treat Puerto Rico as an international point. Interconnection Arrangements Between and Among the Domestic and International Record Carriers, CC Docket No. 82–122, Memorandum Opinion and Order, 91 FCC 2d *483*, at *para.* 44(c), (1982).

[8] This traffic travels from the subscriber's location to an IRC operating center over a dedicated line leased from the IRC or over PRCA facilities which interconnect with the IRC operating center in San Juan.

mainland. PRCA indicates that it will offer other unspecified record services at a later time if sufficient demand develops.

5. In order to provide its Telex and Mailgram services, PRCA proposes to lease, from All American Cables and Radio, Inc. (AACR) and American Telephone and Telegraph Company (AT&T), one duplex voice grade (4 KHz) channel between its San Juan operating center and the Western Union operating center in New York.[9] PRCA states that it does not intend to solicit Telex subscribers in the United States mainland but will rely on interconnections with Western Union. PRCA also states that it will continue existing connections with the IRCs.[10]

6. PRCA maintains that entry of another carrier into the off-island market is reasonably feasible. It cites the continual increase of Telex volumes and revenues to the IRCs and argues that the IRCs will not suffer from increased competition even if the record market growth pattern only continues at the present rate. PRCA points out that since 1974 total IRC Telex volume and revenues have increased by 20.5% and 18% per year respectively.[11] Furthermore, PRCA asserts that Telex traffic between Puerto Rico and the U.S. mainland increased from 2.2 million minutes in 1976 to 2.8 million minutes in 1979.

7. According to PRCA, it must have authorization for direct interconnection with Western Union in order to be able to compete effectively with the IRCs for off-island subscribers. PRCA asserts that the IRCs do not charge their subscribers for the intra-Puerto Rico haul. Thus, no matter where located on the island, the IRC subscriber pays $1.15 per minute for Telex service to the mainland. PRCA subscribers on the other hand must pay the PRCA rate for the local portion of the call plus an additional $.38 per minute for the Puerto Rico-U.S. mainland haul carried by the IRCs. PRCA claims that this has not only caused it to lose subscribers but has made it difficult to attract new ones. To correct this situation, PRCA states that if granted Section 214 authorization it will provide off-island Telex services at $1.10 per minute, a lower rate than the IRCs offer.[12] PRCA concludes that granting its application will enhance

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[9] The leased channel will be subdivided to initially derive eighteen 50 baud and two 110 baud channels. PRCA states that it will require additional multiplex (TDM) equipment to derive these channels.

[10] All traffic between PRCA and Western Union networks will be billed by PRCA at $1.10 per minute. Existing traffic will be billed to the IRCs at $0.38 per minute. PRCA application, exhibits II and III.

[11] Application of International Relay, Inc. File No. I-T-C-2933 at 6, n. 3 (filed January 9, 1980).

[12] PRCA estimates a net increase in revenues of $1,304,739 from expansion of its Telex service to serve points outside of Puerto Rico directly. PRCA makes no estimates of expenses and revenues from the introduction of Mailgram service to points outside of Puerto Rico. PRCA does however, provide proposed rates for Mailgram service which will be filed in a tariff if Section 214 authorization is granted. PRCA application, Exhibit III.

competition in the Puerto Rico-U.S. mainland record market and result in expanded consumer choice and reduced rates.

III. The IRC Oppositions

8. ITT, RCA, TRT and WUI, the IRCs currently authorized to provide record communications between Puerto Rico and other points, oppose PRCA's application. All argue that a grant of the PRCA application would be a violation of Section 222 of the Communications Act. However, all of these pleadings were filed prior to the enactment of the Record Carrier Competition Act of 1981 (RCCA), which amended Section 222 of the Communications Act.[13] As a result of the changes in Section 222, the specific statutory challenges of the IRC's are moot and need not be considered here. The IRC's further contend that PRCA's entry into the Puerto Rico-U.S. mainland record market would create an anti-competitive environment and thus the PRCA application should be denied as not in the public interest.

9. *Anti-Competitive Effects*. WUI and RCA question the terms and conditions on which Western Union will deal with PRCA concerning interconnection and distribution of traffic. These carriers allege that in light of difficulties other IRCs have had with Western Union in attempting to arrange for international Mailgram service, it is possible that Western Union intends to deal with PRCA on an exclusive or preferential basis. They contend that PRCA must clarify these conditions before the Commission may act on its application.[14]

10. ITT, TRT and WUI assert that as a government entity PRCA should not be authorized to compete with private carriers. They allege that PRCA has certain economic benefits such as exemption from income taxes, not available to the IRCs, and that this gives PRCA an unfair competitive advantage.

11. Furthermore, these carriers assert that PRCA has monopoly control over intra-island record communications, and along with its sister corporation, the Puerto Rico Telephone Company (PRTC), controls all local access and intra-island transmission facilities within Puerto Rico. Therefore, they argue that PRCA is in a position to deny the IRCs access to necessary facilities which are needed to connect IRC customers outside of San Juan with the IRC operating

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[13] P.L. 97-130, 95 Stat 1687.

[14] Western Union filed comments in response to the IRC allegations. It contends that it is on record as being willing to interconnect with any and all authorized carriers. Western Union states that consistent with that policy it has offered to interconnect with PRCA and to lease space to PRCA at the Western Union New York operating center, if the PRCA application is granted. However, it states that no agreements have yet been reached. Western Union asserts that it does not intend to offer terms to PRCA any more favorable than the terms on which it deals with the incumbent IRCs nor does it intend to engage in any special promotion of PRCA.

centers. The IRCs allege that in the past PRCA has not been reluctant to use this control to delay or deny direct IRC service to would-be customers.

12. ITT contends that if granted the authority that it requests, only PRCA would be able to satisfy both the local and off-island record communications needs for Puerto Rico. It states that in the long run, PRCA could divert enough off-island traffic to its own facilities so as to render the continued operations of the present IRCs uneconomic. Thus, the end result according to ITT would be the establishment of a monopoly record service between Puerto Rico and the U.S. mainland. ITT also alleges that the current application along with recent applications filed by PRTC[15] is part of an "overall strategy" on the part of these two "government instrumentalities" to establish a government sponsored communications monopoly for service between Puerto Rico and off-island points.[16]

13. ITT, TRT and WUI also assert that existing competition among the IRCs serves Puerto Rico's off-island record-service needs and that there is no public benefit to be derived from entry by PRCA into the Puerto Rico-U.S. mainland market. They challenge the economic justification made by PRCA in support of its entry. WUI contends that PRCA has failed to accurately take into account the negative impact that its entry would have on the existing IRCs.[17] In light of this potential economic harm, WUI contends that the Commission cannot find that a grant of the PRCA application is in the public interest.

14. Finally, ITT, TRT and WUI assert that if the Commission grants PRCA's application it should also order PRCA to provide interconnection with the IRCs and access to IRC subscribers on terms that are fair and equitable. They contend that only this condition will assure a competitive marketplace environment for Puerto Rico-U.S. mainland record traffic.

15. *Other Record Services*. WUI points out that PRCA proposes to provide Telex services, Mailgram services and "other record services." It contends that the term "other record services" does not comply with the Commission's Rules. WUI asserts that if PRCA wishes to provide services other than Telex and Mailgram, it must specify them with particularity.

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[15] Puerto Rico Telephone Company, File No. I-P-D-8, I-P-C-48 (Request for Section 214 authorization to provide telephone service between Puerto Rico and points in and reached via the U.S. mainland), and Puerto Rico Telephone Co., File No. I-P-C-81–051 (Request for Section 214 authority to provide telephone service between Puerto Rico and Canada via the U.S. mainland).

[16] PRTC filed comments in response to the ITT allegations. It denies ITT's claim and asserts that the PRTC applications should be considered on their own merits.

[17] WUI asserts that entry by PRCA would cause WUI Caribbean to lose at a minimum 20% of its total gross Telex revenues.

IV. PRCA Response

16. PRCA contends that the IRCs allegation that it will obtain preferential treatment from Western Union is without merit. PRCA stresses that if it is granted the requested authority, it intends to enter into interconnection agreements with Western Union on the same terms and conditions as are available to the other carriers.

17. PRCA argues that the Commission has previously found that government entities may be qualified to provide communications services and asserts that its application should not be dismissed simply because it is a public corporation.[18] Furthermore, it asserts that it does not hold a monopoly over any interconnected international facilities on the island. It states that of the total number of circuits being used for the transmission of international Telex and other record services the IRCs use some 2,480 teleprinter and other circuits directly to Puerto Rico customers. It states that this compares with only 1,500 telex and teletype circuits it uses to provide local record services to its subscribers. PRCA contends that the IRCs have never been denied interconnection or access to intra-island facilities and denies that it has discriminated against the IRCs by favoring its own subscribers.

18. PRCA asserts that there is a clear public benefit in its proposal to become the first carrier to offer Mailgram service between Puerto Rico and the U.S. mainland. Furthermore, it reiterates its claim that there is more than enough volume to sustain additional competition for off-island Telex traffic.

19. According to PRCA the term "other record services" as used in the application was intended only to cover "enhancements" of its Telex and Mailgram services.[19] It maintains that the proper place to question the lawfulness of enhancement of a particular service is in a tariff proceeding. PRCA states that if it wishes to offer substantially different or non-compatible record services, such as facsimile or high speed data, it will file an appropriate application for Section 214 authorization. PRCA concludes by asserting that it has always dealt fairly and reasonably with the IRCs and that it will continue to do so.[20]

V. Record Carrier Competition Act

20. After enactment of the RCCA, PRCA submitted a letter asserting that within the meaning of the new law it is a "record carrier" seeking to provide "domestic record communications." Therefore, PRCA contends that under Section 222(d) of the RCCA it

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[18] RCA Global Communications, Inc., 56 FCC 2d 660.

[19] PRCA did not state what it means by "enhancements" of its Telex and Mailgram services.

[20] The IRCs replied to PRCA's response by reiterating their arguments and claiming that PRCA failed to satisfy many of the questions raised in their original pleadings.

is exempt from Section 214 certification. RCA and ITT responded by letter. ITT argues that PRCA is not a "record carrier" within the meaning of the RCCA and thus not entitled to the exemption. Furthermore, both carriers point out that Section 222(d) exemption is only discretionary. ITT asserts that due to PRCA's monopoly of intra-island record services the Commission should give full consideration to the application. RCA argues that the Commission should consider and deny PRCA'S application unless it clarifies its proposed interconnection arrangements with Western Union.

VI. Discussion

21. The RCCA requires the Commission to promote the development of fully competitive markets in the provision of record communications services. Upon consideration of the filings in this proceeding and the RCCA, we conclude here that a grant of PRCA's application to provide communication services, including Telex and Mailgram, in the Puerto Rico - U.S. mainland market is required by the public convenience and necessity. In reaching this decision, we have analyzied below the following issues: (a) whether PRCA needs to file an application under the RCCA or our *Competitive Carrier* orders, (b) whether Puerto Rico is a "domestic point" and whether PRCA is a "record carrier" under the RCCA, (c) the anti-competitive concerns of the IRC's including the effect of the RCCA on PRCA's intra-island monopoly for record services, (d) what communication services PRCA should be authorized to provide.

A. *PRCA is not Exempted from Section 214 Certification.*

22. We must first determine whether we need even consider PRCA's application in view of Section 222(d) of the RCCA, which exempts certain carriers from the need to seek Section 214 authorization. Section 222(d) provides:

> Any *record carrier* seeking to provide *domestic* record communications service may provide such service without submitting an application to the Commission under Section 214 unless the Commission requires such a submission.[21]

23. In our decision prescribing tariffs for the various carriers pursuant to the RCCA, we reserved the right to determine the status of Puerto Rico as a domestic or foreign point under the RCCA and to treat Puerto Rico record services accordingly.[22] To act on PRCA's application, we must now make that determination.

24. Under the old Section 222, Puerto Rico was not included

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[21] Section 222(a)(3) of the RCCA defines record communications as those services traditionally offered by telegraph companies involving an interconnection network of teletypewriters.

[22] In the Matter of Interconnection Arrangements Between and Among the Domestic and International Record Carriers, CC Docket No. 82-122, Memorandum Opinion and Order, *supra.* n.7, at n.51. We note that in their letters concerning the effect of the RCCA on the pending application, PRCA, RCA and ITT all considered Puerto Rico to be a domestic point under the new legislation.

within the definition of "Continental United States" contained in that section.[23] Therefore, for record communication services, Puerto Rico was historically treated as an international point. Under the RCCA, the term "Continental United States" is no longer used. The term "United States" is used, but is not defined in the RCCA.

25. Therefore, the classification of Puerto Rico as "domestic" or "foreign" is controlled by Sections 3(e), 3(f) and 3(g) of the Communications Act. Section 3(g) of the Act defines the "United States" as meaning the "States and Territories, the District of Columbia, and the possessions of the United States." While at first it may be unclear whether Puerto Rico, which has "Commonwealth" status falls within the "territories" or "possessions" language, a further analysis of the Act reveals that it does. Section 3(f) defines "foreign communications" as communications from or to any place in the United States to or from a *foreign country*. Thus, clearly communications between Puerto Rico and the U.S. mainland cannot be classified as "foreign" under the general definition in the Act. Therefore, we believe that in removing the definition of "Continental United States" from Section 222 it was the intent of Congress that Puerto Rico no longer be treated as a foreign or international point for record services. This result is consistent with our previous actions in achieving telephone rate integration for Puerto Rico. In those actions we considered Alaska, Hawaii and Puerto Rico as domestic points for telephone ratemaking purposes.[24] [25]

26. However, to be exempt from Section 214 certification PRCA must be classified as a "record carrier" as defined in the RCCA. Section 222(a)(2) clearly indicates that the term "record carrier" does not include any entity which "derives a majority of its revenues during any calendar year from the provision of services other than record communications service." In a letter dated November 16, 1982, PRCA reports that as of June 30, 1982, its total revenues derived from record communications were $2.14 million, only about 10% of total company revenues of $26 million for 1982.[26] Therefore, PRCA does not meet the standard of "record carrier" as set forth in

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[23] See n.1.

[25] As a domestic point all relevant domestic policies apply to Puerto Rico. We note that the IRCs are treating Puerto Rico as an international point on an interim basis for purposes of implementing the RCCA. With today's decision, all carriers must now treat Puerto Rico as a domestic point and our RCCA tariff prescription Order for domestic points will apply. See Interconnection Arrangements Between the Domestic and International Record Carriers, CC Docket No. 82-122, Interim Order, 89 FCC 2d 928 (1982) and Memorandum Opinion and Order, *supra*. n.7. We shall therefore require all record carriers providing record communications service to Puerto Rico to file appropriate tariff revisions within 15 days of the release of this Order to be effective on 30 days notice.

[26] The rest of PRCA's revenues come from its intra-island telephone service.

the RCCA. Accordingly, we must give full consideration to the PRCA application.

B. *PRCA Should be Certified Pursuant to Section 214 of the Communications Act.*

27. *Potential Preferential Dealing.* The IRCs argue that in light of potential preferential dealings between Western Union and PRCA the Commission cannot grant PRCA's application. We note that Western Union is on record as being willing to interconnect with all authorized carriers on the same terms and conditions. At this time the IRCs assertion that Western Union will discriminate against them in favor of PRCA is conjecture. Should it develop that Western Union does in fact discriminate, the IRCs may petition the Commission for relief. Under the Communications Act we have the authority to take action by prescribing the terms and conditions of interconnection between record carriers,[27] and we will exercise this authority to prevent discriminatory conduct. Given our authority, it would be inappropriate to deny PRCA's application based merely on speculation by the IRCs of potential preferential dealings between Western Union and PRCA.

28. *The RCCA.* Prior to passage of the RCCA, the standard governing entry of a new carrier into a given market required the Commission to determine that additional competition was reasonably feasible and that it was in the public interest.[28] In making its determination that entry was in the public interest, the Commission could not assume that competition was advantageous. Instead, it had to find some beneficial purpose in authorizing a carrier to compete.[29]

29. However, in enacting the RCCA, Congress amended this standard. It predicated the underlying statutory scheme, in part, on the assumption that competition in both the domestic and international markets will better serve the needs of users of record services.[30] In effect, Congress made a general policy determination that competition through entry by new carriers providing record communications serves the public interest and constitutes a goal that this Commission is mandated to attain.[31] Certification of PRCA for off-island record services would be consistent with this broad pro-competitive, open-entry policy.

30. *Anti-Competitive Arguments of the IRCs.* The IRCs argue that PRCA should not be permitted to compete because it is a government entity and has certain economic advantages not available to the IRCs. However, even prior to the RCCA, we recognized

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[27] Section 222(c)(1)(A)(i), 47 U.S.C. 222(c)(1)(A)(i); and Section 201, 47 U.S.C. 201.

[28] FCC v. RCA Communications, Inc., 346 U.S. 86 (1953).

[29] *Id.* at 96–97.

[30] The Western Union Telegraph Company, File No. I-T-C-82-142, FCC 82-378, released August 12, 1982.

[31] *Id.* at para. 28.

that a government entity could be authorized to provide communications services.[32] Absent any Commission rule against governmental operation of facilities, it follows that a governmental entity's possession of potential advantages by virtue of its status alone should not preclude authorization pursuant to Section 214. Our primary concern is to ensure that the benefits of the best possible service at the lowest prices are made available to the public. In this regard, the IRC's have not shown how any of the alleged financial advantages accruing to PRCA by virtue of its governmental status would frustrate this goal. We will not prevent PRCA from entering the off-island record market simply because it is a government entity.

31. The IRCs further contend that entry by PRCA would be anticompetitive in light of its monopoly over intra-island record services. They assert that due to this monopoly, PRCA is in a position to deny access facilities to the IRCs and to discriminate against the IRCs in favor of its own customers.[33] However, we note that Section 222(d) of the RCCA provides that:

> . . . *each* record carrier may provide record communications service *in the United States domestic market* and in the international market.

In enacting this provision, it was the intent of Congress to authorize open entry in all domestic markets and to pre-empt local jurisdiction over record communications service.[34] In today's Order we have concluded that Puerto Rico is a domestic point. Accordingly, under the RCCA, any record carrier may provide record services in the intra-Puerto Rico market in competition with PRCA. Furthermore, once certified PRCA will be subject to the provisions of the Communications Act. Should IRC concern about discriminatory treatment by PRCA materialize, we will take appropriate action pursuant to our authority under Section 201 of the Act, upon petition by an IRC.[35]

32. *Tariff Prescription Order*. Because PRCA is not a "record carrier" within the meaning of the RCCA it is not technically subject to our tariff prescription Order enacted pursuant to the new legislation.[36] However, in light of PRCA's current intra-island

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[32] RCA Global Communications, Inc., 56 FCC 2d 660, 692–693 (1975).

[33] We note that for off-island calls an IRC has the ability to run dedicated lines from its customers' premises directly to its operating center in San Juan, thus bypassing any PRCA involvement in the transmission. See n.8.

[34] See Committee Report at p. 7 on H.R. 4927 addressing the same language that was eventually adopted in the RCCA.

[35] Because at this time PRCA is not a "record carrier" within the meaning of the RCCA, it is not directly subject to the RCCA, including its interconnection provisions. However, as the RCCA makes clear, our authority under Section 201 is not effected in any way by the RCCA. Section 222(e)(2), 47 U.S.C. 222(e)(2).

[36] Interconnection Arrangements Between the Domestic and International Carriers, Memorandum Opinion and Order, *supra.*, n.7 and Interim Order, *supra.*, n.25.

dominant market position, we will condition PRCA's authorization on it being subject to all terms of our tariff prescription concerning domestic points.[37] Subject to this condition, we find that certification of PRCA pursuant to Section 214 of the Act, to enter the Puerto Rico - U.S. mainland record market for the provision of Telex and Mailgram serves the public convenience and necessity.

C. *PRCA's Authorization for Use of the Facilities Should not be Limited*

33. In its application PRCA requests authority to provide Telex service, Mailgram service, and "other record services." WUI contends that the term "other record services" does not comply with Commission rules and that PRCA's authorization should be limited to the specified Telex and Mailgram services. In response PRCA states that it will file a Section 214 application if it intends to offer substantially different or non-compatible record services. Furthermore, it states that "other record services" simply means "enhancement" of Telex and Mailgram services. Although there are sufficient public interest grounds for authorization of Telex and Mailgram services, PRCA's request for Section §214 authorization for "other record services" is not specific enough for us to make a public interest finding. However, after an examination of the record we do not find any public benefits in placing a limitation on the services which PRCA may provide over its facilities. Accordingly, PRCA may make the appropriate filings to provide other services if desired.[38]

VII. Conclusion

34. In adopting the RCCA, Congress directed the Commission to promote competition in the provision of record communication services through an open-entry policy. The action we take today is consistent with this goal. PRCA shall be certified as a carrier fully subject to the Communications Act and authorized to provide Telex service between Puerto Rico and the U.S. mainland and Mailgram service outbound from Puerto Rico to the U.S. mainland.

35. Accordingly, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of Telex service between Puerto Rico and the United States mainland and Mailgram service outbound from Puerto Rico to the U.S. mainland by PRCA.

36. IT IS ORDERED that the application IS GRANTED; and PRCA is authorized to:

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[37] Moreover, PRCA has represented to the Commission that soon after authorization it will generate enough revenues from its record communications services to qualify as a "record carrier." *See* PRCA Opposition at p. 7, in which it represented that in the "not too distant future" following grant of its application, it would derive a major portion of its revenues from record service between Puerto Rico and the U.S. mainland.

[38] *See* MCI v. FCC, 561 F.2d 365 (1977) and MCI v. FCC, 580 F.2d 590 (1978).

(a) lease from AACR and AT&T and operate one voice circuit between San Juan, Puerto Rico and New York, New York;
(b) use said facilities to provide Telex and Mailgram services, between Puerto Rico and the U.S. mainland;
(c) acquire and operate additional multiplex (TDM) equipment to derive required 50 and 110 baud channels from voice grade circuit authorizated herein.

37. IT IS FURTHER ORDERED that the Petitions to Deny of ITT and TRT, and the joint Petition to Deny or Defer of WUI and WUI Carribean ARE DENIED.

38. IT IS FURTHER ORDERED, that all record carriers providing record communications service to Puerto Rico shall file revisions conforming to the Commission's Interim Order, 89 FCC 2d 928 (1982) and Memorandum Opinion and Order, FCC 82–264, released June 11, 1982, to treat Puerto Rico as a domestic point within 15 days of the release of this Order, to be effective on 30 days notice.

FEDERAL COMMUNICATIONS COMMISSION,
WILLIAM J. TRICARICO, *Secretary.*

Common Carrier, Foreign
Common Carrier, Interconnection, Duty to Interconnect
Common Carrier, International
Common Carrier, Interstate
Telephone Companies, Competition

Memorandum Opinion and Order adopted certifying the Puerto Rico Telephone Company (PRTC) as an interstate and foreign carrier authorized to provide telephone service between Puerto Rico and points in and reached via the U.S. mainland and between Puerto Rico and the Virgin Islands.
–Puerto Rico Telephone Co.

FCC 83–27

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
PUERTO RICO TELEPHONE COMPANY	File No. I-P-D-8 File No. I-P-C-48
Application for authorization under the applicable provisions of the Communications Act of 1934, as amended, and the Communications Satellite Act of 1962, as amended: 1) to terminate certain lines in Puerto Rico connecting the facilities of PRTC and All America Cables and Radio, Inc.; 2) to construct additional lines; and 3) to acquire, on an indefeasible right of use basis, interests in certain satellite, terrestrial and submarine facilities between Puerto Rico and the United States Mainland, Puerto Rico and the United States Virgin Islands, and the United States Virgin Islands and the United States Mainland, to provide, jointly with AT&T and ITT Communications, Inc. - Virgin Islands, MTS and WATS between Puerto Rico and points in or reached via the United States Mainland and between Puerto Rico and the United States Virgin Islands.	

MEMORANDUM OPINION AND ORDER

(Adopted: January 20, 1983 Released: February 8, 1983)

BY THE COMMISSION: (COMMISSIONER JONES CONCURRING IN THE

RESULT; COMMISSIONER FOGARTY ABSENT).

I. Background

1. Puerto Rico Telephone Company (PRTC) seeks to be certified as an interstate and foreign carrier, authorized to provide MTS and WATS communication services[1] between Puerto Rico and points in and reached via the United States mainland and between Puerto Rico and the United States Virgin Islands. PRTC proposes to provide through services to and from the U.S. mainland via submarine cable capacity acquired from All America Cables and Radio, Inc. (AACR) and ITT Communications, Inc.-Virgin Islands (ITTCIVI), and via domestic satellite channels routed through the AACR-owned and operated Cayey, Puerto Rico earth station. PRTC plans initially to provide services between Puerto Rico and the U.S. Virgin Islands via the existing AACR-ITTCIVI-owned microwave system.[2]

2. PRTC provides 90% of Puerto Rico's intra-island telephone service.[3] AACR, an affiliate of ITT World Communications Inc., is the longstanding intermediary carrier which links American Telephone and Telegraph Co. (AT&T) on the U.S. mainland with PRTC on Puerto Rico. AACR has served as the intermediary carrier for Puerto Rico for 45 years since International Telephone and Telegraph Corporation purchased and constructed the plant and facilities used to provide its communications service to the Caribbean. AACR's sister affiliate, ITTCIVI, links AT&T with the Virgin Islands Telephone Company, the local intra-island carrier for the Virgin Islands.

3. AACR filed a Petition to Deny PRTC's application. PRTC responded with an opposition to AACR's petition to which AACR replied.

II. The Application

4. This application proposes to revise the current arrangement for the provision of communications services between and among the United States mainland, Puerto Rico, and the U.S. Virgin Islands. Under the current arrangement, all off-island traffic is exchanged through 1800 feet of voice frequency cable located in a San Juan conduit which serves as the point of interconnection between PRTC and AACR. AACR provides off-island service to the U.S. mainland through several facilities: the Cayey earth station which operates with the Comstar domestic satellite system of AT&T; the Florico Cable; and the Florida-St. Thomas cables. AACR is the owner and operator of the Cayey earth station and the major microwave system

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[1] Message Telephone Service and Wide Area Telephone Service.

[2] For administrative convenience, the PRTC application has been construed as a petition to decertify AACR (I-P-D-8) as well as an application for certification of PRTC-(I-P-C-48).

[3] The remaining 10% of the island's telephone service is provided by the Puerto Rico Communications Authority.

between the station and the point of interconnection with PRTC. It controls the Florico cablehead on Puerto Rico. And it shares in ownership and operation of the Microwave facilities between Puerto Rico and the St. Thomas cableheads with ITTCIVI. ITTCIVI controls the St. Thomas cableheads.

5. Under the PRTC proposal, the San Juan conduit will no longer be the sole interconnection point. Interconnection will take place at a number of locations near off-island transmission facilities. PRTC proposes to access the Comstar domestic satellite system via AACR-owned microwave links to the Cayey earth station. It also proposes to interconnect via the Puerto Rico-St. Thomas microwave system with St. Thomas submarine cables one and two.[4] Finally, PRTC proposes to directly interconnect with the Florico Cable. Through routing diversity, it claims it can eliminate costly and duplicative line conditioning, channelizing, and multiplexing while also eliminating any possible system-wide vulnerability resulting from the reliance on voice frequency interconnections through one conduit.

6. In addition, because it does not have ownership shares in the cables or in the satellite earth station, PRTC claims that certification to provide off-island services will entitle it to procure IRU interests in AACR and ITTCIVI owned circuitry. PRTC estimates that 1,224 circuits will be initially required for service to the U.S. mainland. It requests authority to acquire 72 of the 85 circuits on the Florico cable, 576 of 987 circuits in the two St. Thomas cables, and 576 of 600 circuits to Puerto Rico on the satellite. PRTC further estimates that 120 channels will be needed for Puerto Rico-Virgin Islands service.

7. PRTC characterizes its proposal as a "transfer . . . [of] responsibility for the operation of all transmission facilities used to provide interstate MTS and WATS from AACR and ITTCIVI, the middlemen, to PRTC, the carrier directly responsible to the telephone using public."[5] PRTC points out that the Commission has recognized that the public interest and efficiency goals are served when two instead of three carriers provide a direct service.[6] As the local carrier originating MTS/WATS traffic, PRTC views itself as directly accountable to Puerto Rican telephone users and thus likely to be more conscientious in improving the quality of service and reducing its cost. It contends that by eliminating the middleman, service can be rendered at a lower cost and with less noise and

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[4] Since the time PRTC filed its application the Commission has authorized a third Florida-St. Thomas submarine cable, American Telephone and Telegraph Co., 88 FCC2d 1630 (1982).

[5] Puerto Rico Telephone Co., PRTC Application at 8.

[6] *See All America Cables and Radio, Inc.*, 15 FCC 2d 1, 14 (1968), *quoting Ownership and Operation of Earth Stations*, 5 FCC 2d 812, 818–819 (1966); *See also* AACR Final Decision at 831.

distortion. It further contends that service will be more reliable because there will be a greater number of routes in use. PRTC asserts that the present configuration requires unnecessary equipment, line conditioning, and backhauling of traffic between lines of demarcation dividing responsibility borne by it and AACR. According to PRTC, service costs rise as unnecessary circuit multiplexing and demultiplexing occurs and service quality suffers when complex carrier coordination, maintenance, management, and planning must take place among three or four instead of two carriers.

8. PRTC notes that there is an existing traffic agreement between and among AT&T, AACR and ITTCIVI which appears to require AT&T to deal exclusively with AACR and ITTCIVI in the provision of service to and from Puerto Rico and to deal exclusively with ITTCIVI for service to and from the Virgin Islands. Further, PRTC states that it is operating under a traffic agreement with AACR whereby it guarantees AACR fifty percent of all off-island traffic. PRTC argues that the existing contracts are essentially anachronisms that have outlived their usefulness and should not be allowed to impede PRTC's entry into off island telephone service. PRTC asks that the Commission abrogate these contracts.

9. PRTC contends that its proposal will result in better facilities planning, maintenance, line restoration, and investment decision-making. It claims that eliminating the middleman will result in better facilities coordination and utilization plans with AT&T. It further claims that greater efficiency in line interconnection will generate significant cost savings. Finally, it maintains that its affiliation with the government of Puerto Rico will enable it to acquire investment capital at lower cost which will lead to lower rates for the public.

III. Responsive Pleadings

A. *AACR Petition To Deny*

10. In a Petition to Deny, AACR characterizes PRTC's application as an attempt by a government agency "to decertify" AACR of its status as an "appropriate local carrier,"—an FCC-sanctioned title recognizing it as the carrier experienced and qualified to provide communications services between the U.S. mainland and Puerto Rico via a number of facilities. AACR places great emphasis on our decision in Docket No. 20598 authorizing it to own and operate a satellite earth station on Puerto Rico, previously owned by Comsat and used for international service.[7] It construes this decision as an

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[7] In 1972, the Commission ordered the integration of Alaska, Hawaii, and Puerto Rico into the set of domestic points for ratemaking purposes. Establishment of Domestic Communications Satellite Facilities for Non-Governmental Entities, (Second Report and Order) 35 FCC 2d 844, 858 (1972) [hereinafter cited as Domestic Communications Satellite Facilities], *on reconsideration*, 38 FCC 2d 665, 695–96 (1972), *implemented*, 62 FCC 2d 633 (1976). In conjunction with rate integration

overall endorsement of its efficiency, innovation, and coordination skills in facilities ownership and management. It claims that the certification of PRTC would be inconsistent with the Commission's determination that AACR's expertise warrants its operation of Puerto Rico's earth station and the provision of MTS/WATs service to Puerto Rico.

11. In addition, AACR asserts that the contract between and among AACR, ITTCIVI and AT&T and the contract between AACR and PRTC were in evidence in Docket No. 20598 and are protected by the bar of *res judicata*. However, even without this protection, AACR argues that there is no legal or factual basis for the Commission to abrogate the existing contracts. It contends that Docket 20598 should have *res judicata* weight and stands for the general proposition that "the majority owner and user of the relevant facilities" involved should be able to control the operation and availability of its lines.

12. AACR contends that requiring it to convey IRU interests to PRTC would make it a "forced seller" of capital interests. If it is required to make such conveyance, AACR states it would accrue less revenues from line ownership because it would be paid at a fixed rate instead of sharing in toll revenues. It claims that this outcome would relegate it to the status of facilities manager and operator for the primary benefit of PRTC. It further claims that the approval of PRTC's application would result in the sale of its capital interests in dedicated interstate facilities at less than compensatory rates. While it would retain title to these facilities, AACR claims that IRU conveyances would not compensate it adequately and therefore would be an uncompensated taking of property.

13. AACR deems PRTC's alleged public interest benefits as either *de minimis* or illusory. It claims that only minor noise reduction and improved reliability will result from PRTC's routing plans. It points to a proven performance record as justification for maintenance of the current three carrier arrangement. AACR claims that its long standing cooperative relationship with AT&T overshadows PRTC's alleged efficiency and innovations in off-island

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was the conversion of the Comsat-operated Cayey, Puerto Rico, international earth station to domestic service. In Docket No. 20598, the Commission authorized AACR to own and operate the only satellite earth station on Puerto Rico, the major microwave system to access the earth station, and the site for interconnection with PRTC. However, the Commission recognized "that the best, most efficient and economical domestic satellite service ordinarily would be provided by AT&T and a local carrier, without the introduction of a third carrier whose function would be to own the facility through which AT&T and the local carrier would be interconnected." *All America Cables and Radio, Inc.* et al., 58 FCC 2d 993, 1000 (1975). (hearing designation order) *cited in All America Cables and Radio, Inc.*, Docket No. 20598, 70 F.C.C. 2d 824 (1979) (final decision) [hereinafter cited as AACR—Final Decision]; *on reconsideration*, 74 FCC 2d 133 (1979), [hereinafter cited as AACR-Reconsideration Decision] *affirmed sub nom. Puerto Rico Telephone Authority v. FCC*, 656 F.2d 900 (1981).

operations. It asserts that the conveyances of IRUs to PRTC will result in operational inefficiencies, disincentives for expansion of needed capacity, and the transformation of usable equipment to surplus. Finally, AACR contends that insofar as PRTC seeks interconnection with AT&T and ITTCIVI, the Commission cannot grant PRTC's application without a full evidentiary hearing in light of Section 201 of the Communications Act.

B. *PRTC Opposition And AACR Reply*

14. In opposition to AACR's Petition to Deny, PRTC asserts that Docket 20598 did not address the merits of the issues now raised in its application. These issues are therefore not barred by *res judicata* according to PRTC. PRTC contends that the Commission clearly has the authority to abrogate existing contracts if they are not in the public interest. It urges the Commission to abrogate the existing contracts so that the public interest will be better served by opening the way for PRTC to compete in the provision of off-island telephone service. PRTC argues that it has vastly overhauled the system it acquired from AACR and that this has resulted in improved local and intra-island telephone service. PRTC claims that this record demonstrates that it will foster superior efficiency, responsiveness, and transmission capacity.[8] It asserts that as a governmental enterprise and a more efficient competitor than AACR, its cost of capital will be lower than AACR's and roughly commensurate with the costs for mainland interstate carriers.

15. PRTC insists that the Commission's decision to award AACR the right to acquire and operate the Cayey earth station has no value for determining whether PRTC should be able to expand into new markets. PRTC views Docket 20598 merely as expanding AACR's ownership in an earth station beyond its initial thirty percent share. PRTC asserts that the issue before us is whether it is eligible under Section 214 to expand its responsibilities by providing MTS and WATS to its customers through direct interconnection with off-island correspondents. It argues that it needs IRU access to commence off-island services. In its view, a refusal by AACR to accord access would constitute unlawful discrimination under Section 202(a) of the Communications Act because AACR's authorizations have been conditioned on its willingness to make IRUs available to authorized carriers.[9]

16. In reply, AACR reiterates its previous contentions and

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[8] PRTC points to the installation and use of its Caparra electronic switching center as an example of its efforts to upgrade domestic service and notes that the integration of electronic switching would represent a major improvement over the San Juan coaxial cable interconnection between it and AACR. By routing U.S. calls through Caparra, PRTC claims that it can reduce costs and eliminate duplicative signaling and audio testing.

[9] *See, e.g.*, AACR Initial Decision, at 853.

asserts that PRTC's proposal amounts to a plan to disqualify AACR from providing MTS/WATS between Puerto Rico and the United States. It claims that PRTC's proposed reconfiguration will result in a three million dollar wasteful investment, and concludes that "PRTC is asking that a private interstate carrier after 43 years, exist primarily for the purpose of being a non-profit servant of a local governmental carrier, to which it would sell the overwhelming portion of its investment."

IV. Discussion

17. At the outset, we emphasize our commitment to create, where possible, a competitive marketplace with maximization of consumer choice fostered by new carrier entry into service areas.[10] We are also committed to the dismantling of artificial restrictions on services and anachronistic arrangements which do not serve the public interest.[11] In the matter before us, we must consider historical, technological and operational limitations which have institutionalized multiple carrier coordination requirements for service between and among the U.S. mainland, Puerto Rico and the U.S. Virgin Islands.

18. PRTC's application does not present a normal Section 214 request for extension of lines of communication. PRTC has applied to compete in the provision of telephone service to and from the U.S. mainland through the acquisition of IRUs in a substantial number of AACR and ITTCIVI circuits in existing facilities. In effect, PRTC

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[10] *See* MTS and WATS Market Structure, 81 FCC 2d 177, 200 (1980), (Commission determination that the public interest is served by competition in the provision of message telephone service (MTS), wide area telephone service (WATS) and their functional equivalents in the lower 48 states and Hawaii); and, CC Docket No. 78–72, Phase 2, FCC 82–515, adopted November 18, 1982 (extending that finding to Alaska). *See, also,* Specialized Common Carrier Services, 29 FCC 2d 870, *on reconsideration,* 35 FCC 2d 1106 (1971), *affirmed sub nom.,* Washington Utilities and Transportation Comm. v. FCC, 512 F.2d 1142 (2d Cir.) *cert. denied,* 423 U.S. 836 (1975) (FCC policies promoting domestic common carrier competition); Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities, 47 FCC 2d 644, 48 FCC 2d 1077 (1974), 60 FCC 2d 261 (1976), *modified,* 61 FCC 2d 70, *further modification,* 62 FCC 2d 588 (1977), *affirmed sub nom.* American Telephone and Telegraph Co. v. FCC, 572 F.2d 17 (2d Cir.), *cert. denied,* 439 U.S. 878 (1978); International Relay, Inc., 77 FCC 2d 819 (1980) (authorization of new store and forward telex service), *on reconsideration,* 82 FCC 2d 41 (1980), The Western Union Telegraph Co., FCC 82–378, (released August 12, 1982) (authorization of WU's reentry into the international record services marketplace).

[11] *See, e.g.,* Aeronautical Radio, Inc. (Authorized Users), 77 FCC 2d 535 (1980) (consideration of eliminating restriction on Comsat's provision of satellite capacity to non-carriers and end-users); Proposed Modifications of the Commission's Authorized User Policy Concerning Access to the International Satellite Services of the Communications Satellite Corp., FCC 82–357 (released August 19, 1982) Scope of Operations (Gateways), 76 FCC 2d 115 (1980), *affirmed sub nom.,* The Western Union Telegraph Co. v. FCC, 665 F.2d n.26 (D.C. Cir. 1981) (expanded points of operation within U.S.)

requests that we order displacement of AACR as the major off-island carrier in its favor. As a result, the application raises interrelated questions concerning Commission policy in compelling the sale of IRU interests by one carrier to another. It also raises questions as to the nature of competition in off-island telephone service if we certify PRTC as an off-island carrier. We must also consider whether PRTC would offer unfair competition as a government-owned entity. Finally, we must address the Commission's authority to modify existing carrier to carrier contracts.

A. *PRTC Is Not Barred From Entry By Our Decision In Docket No. 20589.*

19. AACR claims that our decision in Docket No. 20598 authorizing the transfer of ownership of the Cayey earth station to AACR is entitled to *res judicata* weight and effectively bars PRTC from being authorized to provide off-island telephone service. We disagree. In that decision, we sought to have the earth station which would link Puerto Rico and the U.S. mainland via domestic satellites managed by a qualified carrier. AACR was the only local carrier that applied for the service. We simply concluded that AACR is an appropriate local carrier to own and operate the Cayey earth station in order to provide message telephone service between the U.S. mainland and Puerto Rico in conjuction with the Comstar system.[12] Our endorsement of singular AACR management and operation of the Cayey earth station did not vest AACR with a preferred or exclusive market position in perpetuity for all off-island service. In fact we specifically held otherwise. We pointed out that Docket No. 20598 was not a comparative proceeding, and that if PRTC or any other entity wanted to apply for authority to construct and operate a domestic satellite earth station in Puerto Rico, it was free to do so.[13] Furthermore, our decision in Docket No. 20598 does not bar us from taking measures to improve the manner by which off-island service is provided.[14]

B. *PRTC Is Qualified To Provide Off-Island Telephone Service.*

20. Authorization to acquire facilities to provide off-island services would subject PRTC to the full provisions of the Communications Act for the first time. PRTC currently operates as a "connecting carrier"—engaging in interstate and foreign communications solely through physical interconnection with the facilities of another carrier.[15] To determine if PRTC is qualified to expand operations

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[12] AACR Reconsideration Order, 74 FCC 2d at 143.

[13] AACR Final Decision, 70 FCC 2d at 830–831. We note that PRTC has recently applied for authorization to construct and operate a Domestic satellite earth station in Puerto Rico. Application of Puerto Rico Telephone Company, File No. 1640-DSE-P/L-82, call sign E4488.

[14] *See* Henry Geller v. FCC, 610 F.2d 973 (1979).

[15] Communications Act of 1934, as amended, Section 2(c)(2), 47 U.S.C. §152(b)(2)(1976); *see also* 47 U.S.C. §153(a).

into new markets, we will examine whether it possesses the technical, operational and financial ability to serve off-island points.[16]

21. Information presented by PRTC in support of its application and other statistical and financial compilations indicate that PRTC has made substantial improvements in service quality and in its financial viability. PRTC reports that it has upgraded its facilities and services.[17] Many statistical indices attest to a more efficient and cost-effective service. In 1974, 466,465 telephones, or 15.25 per 100 in population were in service for customers on Puerto Rico. In 1980, there were 619,183 telephones or 19.9 per 100 in population.[18] The blocking rate for local calling, which was 8.6 percent in 1973, improved to 2.5 percent by the end of 1978.[19] PRTC reports that it has launched programs to train employees, installed a new testing and electronic switching plant, improved maintenance and pressurization of cables and provided for new microwave routes. PRTC has improved productivity by reducing the number of employees per 1000 telephones since 1974 from a ratio of 9.9 to 9.4.

22. PRTC has recently been experiencing an upward trend in its financial health.[20] In 1977, PRTC had a total net investment of approximately $600 million and earned $44 million in operating income on revenues of $144 million. By the end of 1981, net investment had grown by nearly 40% to $837 million.[21] Operating revenues had grown to $248 million, representing an average annual growth rate of nearly 15% since 1977. Operating income ($55 million) grew at a lower rate than did revenues due to increases in various operating expenses. However, these expenses consisted primarily of either non-cash expenses such as depreciation, or expenses directly related to improvements in service quality. For example, equipment maintenance expenditures nearly doubled during the past four year period. PRTC has been able to finance a large increase in its facilities investment concomitant with a reduction in

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[16] After its severance from AACR and its transfer to Puerto Rico Telephone Authority in 1974, PRTC faced severe financial straits. The Commission noted that PRTC's debt had reached the point where it was without short term borrowing power . . . thereby jeopardizing capital acquisitions for needed plant improvements. AACR-Initial Decision at 854.

[17] PRTC reports that the number of letter complaints received has dropped precipitously to 0.44 per 100 stations as of March 1979. PRTC Opposition at 52.

[18] Data from AT&T Long Lines, The World's Telephones (1974) and PRTC, Annual Report (1980).

[19] PRTC Opposition to Petition to Deny of AACR at 47. For 1980, PRTC reports that metropolitan San Juan blockage was 1.79% and 1.09% for other parts of Puerto Rico.

[20] See Annual Report Form M, 1977-1981.

[21] Investment in PRTC is primarily financed by equity funding from the Puerto Rico Telephone Authority.

its debt ratio, improvement in sources of internal financing, and improvement in the quality and quantity of its service.

23. PRTC appears to be in a sound financial position. Furthermore, the opportunity to provide telephone service to the U.S. mainland and beyond should serve to increase its economic well-being and to enhance its ability to obtain future financing. We conclude that PRTC has the operational, technical and financial capabilities to enter off-island markets without a diminution of existing service.

C. *PRTC Is Not Precluded From Providing Off-Island Service Because It Is a Government-Owned Entity.*

24. AACR argues that entry by a government-owned entity does not constitute full and fair competition with private telecommunications entities. It cites *RCA Global Communications Inc.*, 56 FCC 2d 660, 692-93 (1975), for the premise that government ownership of facilities used to perform commercial communications services violates Commission policy and is prima facie inconsistent with the public interest. We disagree with AACR's reading of this case. Although, the Commission has a policy preference for private enterprise, we have recognized particular instances where government ownership is acceptable and not a usurpation of commercial opportunities. In *RCA Global Communications, Inc.*, we were confronted with competing applications filed by the State of Alaska and RCA Alaska Communications, Inc. to construct satellite earth stations to provide service to rural Alaskan bush communities. In considering the competing applications, we merely indicated that governmental ownership of facilities to be used for the provision of common carrier services was not the usual situation.[22] However, we made clear that governmental ownership of such facilities was not without precedent and did not in itself disqualify the State of Alaska from owning and operating domestic satellite earth stations.

25. We find nothing in AACR's contention that PRTC will have an unfair competitive advantage by virtue of tax and bond benefits enjoyed as a government entity that would warrant denial of PRTC's application. The Commission's primary concern is to ensure that the benefits of the best possible service at the lowest prices are made available to the public. AACR does not show how any of the alleged advantages of PRTC because of its status as a government-owned entity would frustrate this goal. We find no reason to disqualify consideration of PRTC's application to enter the off-island telephone marketplace because of this status. Should anti-competitive conduct occur, appropriate remedies are available to the affected parties.

D. *PRTC's Entry Into Off-Island Markets Is Reasonably Feasible And Is In The Public Interest.*

26. Section 214 of the Communications Act requires a carrier

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[22] 56 FCC 2d at 689.

seeking to serve new points to obtain Commission authorization that additional service is required by the public convenience and necessity. The standards governing the entry of new competitors in a voice market are set forth in *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 96–97 (1953) and require that the Commission make a finding that competition is feasible and is in the public interest. The Commission has previously made a determination that competition in the provision of MTS and WATS service is in the public interest and that any entity opposing entry by a new carrier has the burden to show otherwise by clear and convincing evidence.[23] After an examination of the record, we find that AACR has not met this burden.

27. A review of traffic data submitted by PRTC and an evaluation of circuit and traffic growth in U.S.-Puerto Rico and U.S.-U.S. Virgin Islands telephone calls shows significant traffic increases. PRTC reports that historically the yearly rate of growth for mainland-Puerto Rico calls has been 12.5%. A comparison of actual 1979, 1980, and 1981 circuit usage data filed by AACR and ITTCIVI with the projections in PRTC's application confirm such a growth rate.[24] Similarly, the documentation in the joint application of AT&T, ITTCIVI, and the IRCs for authorization of the Third Florida-St. Thomas Cable System forecasts that Caribbean basin traffic growth will exhaust existing cable facilities for U.S. mainland traffic to other accessible foreign points by 1983.[25] We conclude from this

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[23] MTS and WATS Market Structure, *supra* fn.8 at 204 and CC Docket No. 78–72, Phase 2, *supra* fn.8. While Puerto Rico was not specifically included within the scope of those Orders, we find that the same considerations applicable in those decisions to the U.S. Mainland, Hawaii and Alaska apply to Puerto Rico as well. *See also*: GTE Satellite Corporation, 90 FCC 2d 1009, 1011 (1982).

[24] Indeed PRTC's projected circuit requirements appear conservative:

	1979	1980	1981	1982
		(voice grade circuits)		
Projected: Puerto Rico-U.S. mainland	1080	1224	1368	1548
Puerto Rico-U.S. Virgin Islands	90	114	122	131
(PRTC Application, Exhibit 4 at 2)				
Actual Circuits Authorized				
(AACR circuit status reports for Puerto Rico and U.S. Virgin Islands as of September 30, of each year)	1318	1602	2085	2810

[25] *See* American Telephone and Telegraph Co. *et al.*, 88 FCC 2d 1630, 1634 (1982). *See* also All America Cables and Radio, Inc., File No. I-P-C-142, 142-A, mimeo no. 000303 (released April 17, 1981) (authorization of additional transponder lease to accommodate circuit needs not met by existing submarine cables). The Commission authorized construction of the Third Florida-St. Thomas Cable System on the basis of demand projections of up to 20 percent for annual growth.

growth rate that there is sufficient off-island traffic to support another off-island carrier.

28. However, to enter the off-island market PRTC requests the Commission to require AACR and ITTCIVI to sell it IRUs in a substantial number of circuits in off-island transmission facilities. We will not require these carriers to sell the IRUs that PRTC requests. IRU conveyance has been primarily a voluntary transaction between a carrier owning transmission capacity and another carrier seeking to acquire sufficient capacity to accommodate the needs of its customers.[26] We have exercised our power to condition facility construction authorizations to ensure that new carriers will be afforded access to transmission media and we have retained jurisdiction to reallocate circuitry for new carrier access should it be required in the public interest.[27] However, we have never ordered the transfer of the major incidents of line ownership from an existing carrier-owner to a new competitor, as PRTC asks us to do. PRTC is requesting the Commission to give it the major portion of the off-island market and, in effect, decertify AACR. We find no public interest benefits in decertifying AACR and authorizing PRTC to merely step into AACR's shoes. IRU conveyance may take place on a voluntary basis if it ultimately is in the best interest of all parties concerned. However, we find that no public interest benefits will result from forcing AACR and ITTCIVI to sell IRUs in the circuitry requested by PRTC.

29. As an interstate and foreign carrier, however, PRTC must have the right to access existing facilities essential for off-island telephone service. Under the Communications Act, carriers have an obligation to furnish upon reasonable request connections with other carriers and to establish through routes with facilities and regulations for operating such routes.[28] No carrier may hinder the development of new or expanded common carrier services by the

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[26] The IRU concept is designed, in part, to confer the attributes of transmission capacity ownership without the transfer of title. Communications entities, which did not invest in an ownership share prior to circuitry activation may subsequently obtain a right to acquire capacity and to insert investment costs into its rate base. An IRU acquisition does not confer the power to manage or control the facility.

[27] *See* All America Cables and Radio, Inc., *et al.*, 74 FCC2d 149, 162 (1979) (authorization of AACR's acquisition of title to the existing Cayey earth station with condition that it afford other carriers access to the station and connecting microwave links); *see also* ITT Cable and Radio, Inc.—Puerto Rico, *et al.*, 5 FCC 2d 823 (1966) (applications deferred to allow parties to refile an application for joint operation of 2d Florida-St. Thomas Cable); *application granted*, AT&T, *et al.*, 7 FCC 2d 959, 962 (1967) (retaining jurisdiction over circuitry conveyancing); American Telephone and Telegraph Co., *supra*, (Authorization of 3rd Florida-St. Thomas cable with Commission retention for circuitry matters including power to order AT&T conveyancing of circuitry to new U.S. carriers).

[28] *See, e.g.*, Bell System Tariff Offerings, 46 FCC 2d 413 (1974), *affirmed sub nom.* Bell Telephone Co. of Pa. v. FCC, 503 F.2d 1250 (3d Cir. 1974), *cert. denied*, 422

imposition of arbitrary restrictions on interconnection and/or route arrangements.[29] If necessary, we will mandate one carrier's access to another carrier's facilities through interconnection or leased channel arrangements on reasonable terms and conditions where a carrier has control over essential facilities, as in the present situation.[30]

30. However, we do not believe that it is necessary at this time to prescribe what facilities must be made available to PRTC or the terms and conditions by which facilities are to be made available.[31] In light of their obligations under the Act, we expect, upon reasonable request, AACR, ITTCIVI, and all other appropriate carriers to give PRTC access to essential off-island facilities at fair and non-discriminatory terms and conditions.[32] We expect AACR,

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U.S. 1026 *rehearings denied*, 423 U.S. 886 (1975); MCI Telecommunications Corp. v. FCC, 580 F.2d 590 *cert. denied*, 439 U.S. 980 (1978) (access to local exchange facilities mandated).

[29] Establishment of Domestic Communications Satellite Facilities, 22 FCC 2d 86, 97 (1970), *policy reaffirmed*, 34 FCC 2d 9, 64–5, *adopted*, 35 FCC 2d 844, 856 (1972), *on reconsideration*, 38 FCC 2d 665 (1972) (domestic satellite policy mandates non-discriminatory, diverse, and flexible access to domestic satellites and earth station facilities); *accord* Communications Satellite Corp., *et al.*, FCC 82–376 (released August 11, 1982) (FCC mandates non-discriminatory access for domestic multiple beam Torus satellite antenna construction at INTELSAT earth station sites). *See also*, All American Cable and Radio, Inc., *et al.*, 15 FCC 2d 1, 16 (1968) (Commission ordered equitable access to the then Cayey international earth station via terrestial microwave system).

[30] Communications Act, Section 201(a), 47 U.S.C. Section 201(a). *See* Specialized Common Carrier Services, 29 FCC 2d 870, 940 (1971) (AT&T required to afford local exchange facility access to competing inter-city carriers), *on reconsideration*, 35 FCC 2d 1106 (1971), *affirmed sub nom.*, Washington Utilities and Transportation Comm. v. FCC, 513 F.2d 1192 (9th Cir.), *cert. denied* 423 U.S. 836 (1975); Interconnection Arrangements Between and Among the Domestic and International Record Carriers, Notice of Proposed Rulemaking, 89 FCC 2d 194, Interim Order 89 FCC 2d 928 (1982) (appeal pending).

[31] We note that AACR argues that we cannot order interconnection under Section 201 of the Act without a full evidentiary hearing. Although we are not ordering interconnection at this time, should it become necessary, our authority to so order without a full evidentiary hearing is well established where as here the parties have had an opportunity to present their cases in writing. Bell Telephone Company of Pennsylvania and AT&T v. FCC, 503 F.2d 1250 (3rd Cir. 1974), *cert denied*, 422 U.S. 1026 (1975). *See:* United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 224 (1973); United States v. Florida East Coast Ry. Co., 410 U.S. 224 (1973).

[32] We find that sufficient off-island facilities exist from which PRTC may obtain circuitry to begin off-island services. *See* AT&T's June 24, 1982 utilization report (submitted on July 15, 1982) which shows 46 unassigned circuits in the Comstar transponder pair serving the Hawley, Pennsylvania domestic earth station and 687 unassigned circuits in the transponder pair serving the Homosassa, Florida earth station. These circuits are controlled by AT&T. In addition, AT&T has 1099 latent circuits in the third Florida-St. Thomas cable which will be put in question in 1983. American Telephone and Telegraph Co., *supra*, at 1630. Furthermore, according to their July 31, 1982 circuit status report (submitted on August 15, 1982), AACR and ITTCIVI have 715 idle satellite circuits and 368 idle circuits in the second Florida-St. Thomas cable for service to the U.S. mainland.

ITTCIVI and any other affected carriers to negotiate in good faith. When PRTC makes the necessary arrangements, it must file the appropriate Section 214 application or applications requesting authorization to acquire and operate specific facilities to the U.S. mainland and designated foreign points.[33] If the necessary arrangements are not forthcoming within 90 days after a request by PRTC is submitted, we will entertain a petition from PRTC for an agency order under 47 U.S.C. 201(a).[34]

31. We conclude that certification of PRTC to provide off-island MTS and WATS communication services will result in public benefits and is therefore in the public interest. Because PRTC has a virtual monopoly on local Puerto Rico telephone service and therefore the ability to control the routing of outbound off-island traffic,[35] certification will not result in customer choice of off-island carriers at this time.[36] However, it will introduce competition in the provision of off-island transmission facilities which we believe will result in public benefits. In lieu of seeking facilities from AACR and ITTCIVI either by lease or purchase of IRUs, PRTC may obtain facilities from other carriers (see footnotes 26 and 27) or it may construct or participate in the construction of new off-island facilities.[37] As PRTC constructs its own facilities or obtains facilities from other carriers, the control that AACR and ITTCIVI now have on off-island traffic will decrease. In order to retain off-island traffic, AACR and ITTCIVI will have to offer sufficient facilities to PRTC at rates attractive enough to dissuade PRTC from entering into the cost of constructing its own facilities or from obtaining facilities from another carrier. The dynamics of this arrangement should encourage a more efficient facility configuration for off-island telephone traffic and, as a result, benefit the ratepayer. PRTC will have the

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[33] *See* Sections 63.01(h), (k)(2) and (k)(3) of the Commission's Rules, 47 C.F.R. 63.01(h), (k)(2) and (k)(3).

[34] Should it be necessary, we will address specific allegations of Section 202 violations at that time. We note that in authorizing construction of the second and third Florida-St. Thomas cables, we retained jurisdiction over the allocations of circuitry in those cables. AT&T *et al.*, *supra*, at 962 and American Telephone and Telegraph Co., *supra*, at 1630. We specifically conditioned our authorization of the third Florida-St. Thomas cable on AT&T making circuits available to future U.S. overseas carriers. In addition, we retained jurisdiction over AACR's operation of the Cayey, Puerto Rico earth station to assure that other carriers had access to it and connecting microwave links. All America Cables and Radio, Inc., *et al.*, *supra*, at 162.

[35] Inbound traffic from the U.S. mainland to Puerto Rico and the U.S. Virgin Islands is currently routed by AT&T through AACR and ITTCIVI.

[36] We note, however, that as a fully authorized carrier PRTC will be obligated under Section 201(a) of the Act to provide access to its facilities upon reasonable request from AACR or other carriers. Such access may eventually lead to customer choice of off-island carriers.

[37] As noted, PRTC has recently applied to construct and operate a Domestic satellite earth station in Puerto Rico. *See* n. 12.

opportunity to seek a more efficient means of providing off-island services than through current AACR and ITTCIVI facilities. AACR will have the opportunity to justify in the marketplace continuance of its middleman role.

32. We have previously observed that the most efficient and economical means of providing off-island services to the U.S. mainland would involve only AT&T and the local carrier and not a third carrier whose function would be to own the facility through which AT&T and the local carrier would be interconnected.[38] Certifying PRTC as an off-island carrier so that it can seek the most efficient facility routing to the U.S. mainland through direct interconnection with AT&T will facilitate line coordination, maintenance and investment decision-making. For example, with PRTC's electronic switching centers geographically distant from the sole PRTC-AACR interconnection point, located in San Juan, more flexible and secure routing arrangements to off-island cableheads and the Cayey earth station will result if PRTC is free to coordinate its own routing to these off-island transmission facilities. We believe that this managerial and operational flexibility will lead to lower rates and better quality services for Puerto Rico residents.

D. *The Commission Will Modify The Existing Contract Among AACR, ITTCIVI And AT&T But Not The Contract Between AACR And PRTC.*

33. Having determined that PRTC is qualified to be certified as an interstate and foreign carrier and that it has a right of access to all applicable off-island transmission facilities, we must examine the effects of existing carrier contracts on our decision and determine what, if any, actions we should take.

34. In 1964, AT&T entered into a traffic agreement with Radio Corporation of Puerto Rico, (AACR's predecessor) and ITTCIVI. We note that in their arguments before the Commission, both PRTC and AACR have treated the contract as intending that AT&T arrange for telephone service to and from Puerto Rico and the U.S. Virgin Islands exclusively with AACR and ITTCIVI.

35. The United States Supreme Court has recognized that pursuant to authority from Congress a regulatory agency, following an investigation, may modify carrier to carrier contracts not in the public interest because they are unjust, unreasonable, unduly discriminatory or preferential.[39] It is clear that such authority is

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[38] All America Cables and Radio Inc. *et al.*, 58 FCC 2d 993 at 1000 (1975).

[39] United States Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956); FRC v. Sierra Pacific Power Co., 350 U.S. 348 (1956). Also see: Bell Stytem Tariff Offerings, 46 FCC 2d 413, 431 (1974) *aff'd* Bell telephone Co. of Pa. v. FCC, 503 F.2d 1250 (3rd Cir. 1974); Interconnection Facilities provided to International Record Carriers, 63 FCC 2d 761, 766–767, *reconsidered*, 66 FCC 2d 517, *aff'd* Western Union Int'l v. FCC, 568 F.2d 1012 (2d Cir. 1977) *cert. denied*, 436 U.S. 944 (1978).

vested in this Commission under the Communications Act of 1934, as amended.[40]

36. The contract is issue is before the Commission as an exhibit and has been the subject of extensive pleadings by the parties. Based on our examination of the record we find that we must modify the contract to terminate the exclusive arrangement. Without taking this action, our determination that it is in the public interest for PRTC to engage in off-island telephone communications and our Section 214 authorization for it to do so would be rendered virtually meaningless.

37. Under an exclusive arrangement, PRTC would be unable to use existing facilities for off-island transmission and it would not be able to interconnect with AT&T and ITTCIVI. Such a result would be in direct conflict with our determination that PRTC should have fair and equitable access to all off-island facilities. Without this access PRTC would be unable to compete with AACR for telephone communications to the U.S. mainland and beyond, and to the Virgin Islands. Accordingly, we find that the contract is violative of the public interest to the extent that it precludes PRTC from entering the off-island telephone market.

38. Therefore, to assure that PRTC has the opportunity to provide interstate and foreign telephone communications for Puerto Rico, we are abrogating any and all provisions of the contract between AT&T and the ITT companies that establish exclusive dealings between the parties.[41]

39. We also have under consideration a traffic agreement between AACR and PRTC entered into in 1974 and amended in 1978. This contract provides for PRTC to hand off to AACR at least 50% of PRTC's traffic that must be routed off-island. The agreement will expire on December 31, 1983. It was entered into when PRTC was purchased from AACR by the Puerto Rico Telephone Authority (PRTA). When we approved the transfer of control of PRTC, we examined the contract. At that time we found that the agreement was not unreasonable.[42] It is doubtful that PRTC will initially obtain sufficient off-island facilities to carry more than 50% of its off-island traffic. In light of this fact, and because the contract will expire at the end of 1983, we will not disturb it at this time.

V. Conclusion

40. We are certifying PRTC as an interstate and foreign carrier fully subject to the provisions of the Communications Act and able to serve the growing communications needs of its customers. We find

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[40] MCI v. FCC, 665 F.2d 1300 (1981).

[41] We need not address at this time the question of how AT&T will apportion inbound traffic.

[42] In Re Applications Of Puerto Rico Telephone Co., 47 FCC 2d 1166, 1169–1170 (1974).

that PRTC's entry will serve the public interest, convenience and necessity. However, PRTC does not have any automatic right to acquire IRU interests in the various off-island facilities, and we will not mandate any such conveyances at this time. PRTC may enter into voluntary agreements concerning the sale of IRUs and PRTC has the right to lease available capacity in all off-island microwave, cable and satellite facilities. In order to assure PRTC's right of access to these facilities, we are modifying an existing carrier contract which requires exclusive dealing amont AT&T, AACR and ITTCIVI in off-island traffic.

41. We expect PRTC to negotiate arrangements for off-island facilities with the appropriate carriers. These arrangements shall include leased capacity in the Cayey earth station and associated microwave links as well as in the St. Thomas-Puerto Rico Microwave Radio System. The arrangements shall also include the right of PRTC to lease available submarine cable capacity held by AACR and ITTCIVI.

42. After the necessary agreements are concluded, PRTC must file the appropriate Section 214 application or applications requesting authorization to acquire and operate specific facilities to the U.S. mainland and to designated foreign points. We expect the carriers to negotiate fair and cost justified facilities access and interconnection arrangements. If the carriers can not reach mutually acceptable arrangements within 90 days after a formal request is submitted by PRTC, we will entertain a petition for a Commission order under 47 U.S.C. 201(a).

43. In view of the foregoing, IT IS CERTIFIED that the public convenience and necessity require that Puerto Rico Telephone Company provide interstate and foreign MTS and WATS communication services between Puerto Rico and points in and reach via the U.S. mainland and between Puerto Rico and the U.S. Virgin Islands.

44. Accordingly, IT IS ORDERED that, except to the extent indicated in this Order, application File No. I-P-C-48 IS GRANTED.

45. IT IS FURTHER ORDERED that, pursuant to Sections 4(i), 4(j), 205, 211 and 214 of the Communications Act of 1934, as amended, the carrier contract among AACR, ITTCIVI and AT&T is modified as indicated herein.

46. IT IS FURTHER ORDERED that, File No. I-P-D-8 is DENIED.[43]

47. IT IS FURTHER ORDERED that, except to the extent granted in this Order, the AACR Petition to Deny is DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
WILLIAM J. TRICARICO, *Secretary.*

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[43] See n.2.

Circuits Voice
Common Carrier, Foreign
Common Carrier, International
Common Carrier, Interstate
Common Carrier, Leased Channel Service

Memorandum Opinion and Order adopted authorizing the Puerto Rico Telephone Company (PRTC) to provide telephone service between Puerto Rico and Canada via the U.S. mainland
–*Puerto Rico Telephone Co.*

FCC 83–29

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of PUERTO RICO TELEPHONE COMPANY Application for authorization to acquire and operate up to 12 circuits between San Juan, Puerto Rico, and the United States-Canada border for the joint provision with Teleglobe Canada of message telephone service between Puerto Rico and Canada.	File No. I-P-C-81–039

MEMORANDUM OPINION AND ORDER

(Adopted: January 20, 1983 Released: February 8, 1983)

BY THE COMMISSION: (COMMISSIONER JONES CONCURRING IN THE RESULT; COMMISSIONER FORGARTY ABSENT).

I. Background

1. The Puerto Rico Telephone Company (PRTC) has applied for authority, pursuant to Sections, 1, 4(i), and 214 of the Communications Act of 1934, as amended, 47 U.S.C. §§, 151, 154(i) and 214 (1980), to acquire and operate up to 12 direct telephone circuits between Puerto Rico and Canada for the joint provision of Message Telephone Service (MTS) with Teleglobe Canada, with whom it has reached an operating agreement.[1] PRTC provides 90% of Puerto

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[1] In File Nos. I-P-D-8, I-P-C-48 we are today authorizing PRTC to serve points in and reached via the U.S. mainland and thus establishing it as a carrier fully subject to the provisions of the Communication Act. We state in that decision that we will entertain applications filed by PRTC to serve specific foreign points.

Rico's intra-island telephone service.[2] It currently serves as a "connecting carrier" for origination and termination of off-island traffic.[3]

2. All America Cables and Radio (AACR) filed a Petition to Deny PRTC's application. PRTC responded with an Opposition to which AACR replied. The American Telephone and Telegraph Company (AT&T) and the Communications Satellite Corporation (Comsat) filed additional comments.

II. The Application

3. PRTC has applied for authority to acquire and operate up to 12 direct telephone circuits between Puerto Rico and Canada. It intends to activate eight of these circuits immediately upon authorization. At this time, PRTC interconnects with AACR for off-island telephone services. AACR in turn connects with AT&T for service to the U.S. mainland and points that can be reached via the U.S. mainland. AACR is currently the only carrier providing interconnection between Puerto Rico's local carriers and the appropriate domestic or international carriers for through service to Canada.[4]

4. PRTC' seeks to bypass AACR's middleman function and secure interconnection with a foreign correspondent, Teleglobe, Canada. PRTC proposes to lease circuits between San Juan and New York from AACR and AT&T. The lessors' tariffs (AACR Tariff No. 3 and AT&T Tariff No. 260) do not distinguish between the types of facilities provided and therefore this traffic would be carried to the U.S. mainland by either satellite or submarine cable. PRTC states that the connecting facilities between New York and the Canadian border would be leased under contract from AT&T. Traffic on this route would travel over voice grade terrestrial circuits on AT&T's existing system. For service within Canada, Teleglobe will secure interconnection arrangements with the companies of the Trans Canada Telephone System (TCTS), the inter-province carrier.

5. PRTC claims that it can provide better quality service at reduced rates by leasing lines and coordinating a through service to a point on the U.S.-Canada border where it proposes to interconnect with Teleglobe Canada.[5] It further claims that its routing plan will

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[2] The remaining 10% of Puerto Rico's intra-island Telephone service is provided by the Puerto Rico Communications Authority.

[3] *See* Communications Act of 1934, as amended, Section 3(u), 47 U.S.C. §153(u) (1980). PRTC engages "in interstate or foreign communication solely through physical connection with the facilities of another carrier." 47 U.S.C. §152(b)(2).

[4] There are currently no direct circuits between Puerto Rico and Canada and no correspondent relationships between any carriers in Puerto Rico and Canada. All Puerto Rico-Canada telephone traffic is carried through the facilities of PRTC (in Puerto Rico), AACR and AT&T (between Puerto Rico and the U.S. mainland), AT&T (through the U.S. mainland), and Trans Canada Telephone System (in Canada).

[5] AACR filed tariff revisions which matched PRTC's proposed rates. AACR claimed

improve the quality of service by introducing direct dial service to Canada, while reducing traffic switching, and eliminating multiple rate bands for service to different geographic areas in Canada. Most importantly, it asserts that callers will benefit from a 30% savings rate. For example, a typical three-minute telephone call between Puerto Rico and Canada costing $9.00 would be reduced to $6.00.

6. The PRTC plan would eliminate the need for AACR intermediary switching. Normal traffic loads would exit one of several PRTC toll switching centers on Puerto Rico, rather than solely through one underground conduit in San Juan, as is presently the case. Overflow traffic would be handled on a switched basis. AACR and AT&T would be paid on a usage sensitive rather than revenue division basis for traffic routed first over lines to the U.S. mainland and then to AT&T facilities for transiting to the U.S.-Canadian border.

7. PRTC states that AT&T is willing to lease required facilities to it and Teleglobe Canada and to provide transiting switching for overflow traffic. PRTC will pay for AT&T transiting services pursuant to AT&T's Switched Transit Remuneration Plan.[6] It proposes to pay AACR a $0.15 per minute rate for AACR's participation in overflow traffic routing.

III. Pleadings

A. *AACR Petition To Deny*

8. AACR filed a Petition to Deny setting forth technical, economic and legal reasons for which it believes the Commission should deny PRTC authority to provide services between Puerto Rico and Canada. AACR not only objects to the end of its *de facto* off-island MTS monopoly through Commission authorization of a government-owned competitor, but also challenges the practicality of PRTC's proposal.

1. *Technical Objections*

9. AACR asserts that authorization of PRTC's proposal would result in a fragmented, overloaded, and inefficient routing scheme for Puerto Rico-Canada services. It alleges that PRTC will generate unreasonably high "no circuit" conditions by operating only eight direct circuits initially.[7] It also asserts that PRTC's entry will serve no useful purpose in the face of AACR's longstanding record of

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that the implementation of a cheaper AT&T transiting service fosters the lower rates. AACR, Transmittal No. 88, *revising* AACR Tariff FCC No. 7 (filed September 21, 1981).

[6] The AT&T Switched Transit Remuneration Plan (STRP) simplifies the provision of transiting services via AT&T by replacing a complex revenue sharing procedure with fixed rate charges for the use of AT&T lines.

[7] A "no circuit" condition occurs when all available direct circuits are in use. To accommodate another call at such a time, alternate routes must be employed. These routes often involve circuitous or transiting links often with the use of non-dedicated circuitry.

introducing technical and service innovations. In support, AACR points to the Commission's decision in Docket 20598 authorizing it to own and operate the Cayey, Puerto Rico earth station as an overall endorsement of its technical expertise.[8] AACR also claims that PRTC has delayed the implementation of direct distance dialing to and from Canada and indicates that increased toll switching, less efficient circuit loading, and a general reduction in the quality of service will result from a grant of the application.

2. *Economic Objections*

10. AACR alleges that PRTC has failed to consider the costs of service degradation, traffic loss and congestion, as well as the cost of additional connecting facilities between AT&T in Jacksonville and Teleglobe Canada in Montreal, which according to AACR would be necessary for overflow routing. AACR would require PRTC to employ a fully distributed cost methodology in justifying its proposal. AACR implies that fully distributed costs would show that PRTC cannot provide the service as efficiently and cheaply as AACR, notwithstanding the fact that at the time of filing, PRTC's application proposed rate savings of up to one-third.

11. AACR objects to PRTC's assumption that it would perform an overflow traffic carriage service, and that should it opt to provide such a service, a $0.15 per minute rate is cost justified and appropriate. AACR considers PRTC's decision to activate only eight circuits initially as evidence that PRTC is concerned with profit maximization at the expense of customer convenience. The cost of eight direct circuits in conjunction with higher revenues will accrue greater earnings for PRTC than what continued participation in toll settlements would accord. However, immediate installation of 12 circuits, which AACR contends is still inadequate, would generate less earnings for PRTC than if it continued to serve as a connecting carrier. AACR objects to any alteration in the status quo which would change the terms and conditions of its contracts and traffic agreements with PRTC. Finally, it contends that PRTC miscalculates estimated revenues and demand growth.

3. *Legal and Miscellaneous Arguments*

12. AACR maintains that PRTC's market entry would not generate true competitive benefits because PRTC does not propose to construct or invest in the construction of facilities. AACR claims that it could implement direct dial services and the cost savings

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[8] All America Cables and Radio, Inc., 58 FCC 2d 993 (1975) (designation order for a hearing on AACR acquisition and operation of the Cayey, Puerto Rico, earth station to be converted for domestic service); 70 FCC 2d 838 (1977) (initial decision), 69 FCC 2d 1650 (1978) (Review Board decision); 70 FCC 2d 824 (1979) (final decision), *affirmed sub nom.* Puerto Rico Telephone Authority v. FCC, 656 F.2d 900 (D.C. Cir. 1981).

PRTC proposes when and if PRTC cooperates with it. Instead it maintains, PRTC unfairly favors a foreign carrier at the expense of AACR whose services and facilities have not been proved inadequate.

13. AACR asserts that use of the Comstar domestic satellite to provide any part of the service from Puerto Rico to Canada might constitute illegal international common carriage. AACR claims that international resale restrictions contained in AT&T Tariff No. 260 bar PRTC's proposal. It further asserts that AT&T must file a Section 214 application for its transiting services even though such services are now available pursuant to tariff.[9]

14. AACR concludes that the merits of the PRTC application do not warrant authorization. However, if the Commission should consider authorization as an option, AACR contends that a full evidentiary hearing should be designated to address all questions of fact and law.

B. *PRTC Opposition*

15. PRTC opposes AACR's Petition to Deny. PRTC argues that AACR reliance on Commission findings in Docket 20598 to support continuing its current monopoly of off-island service, including service to Canada, is misplaced. PRTC contends that in Docket 20598 the Commission merely deemed AACR qualified to own and operate the Cayey earth station for the purpose of converting it to provide domestic services to and from Puerto Rico.[10] In response to AACR's comments on overflow routing, PRTC explains that all switching will conform with North America/CCITT standards with TCTS-Teleglobe Canada interconnection a matter of Canadian jurisdiction and coordination. It challenges AACR's contention that the proposed plan will foster more burdensome routing or costly service. For example, it notes that AACR's comparison of routing arrangements ignores the fact that AT&T currently employs alternate routing procedures involving one or more intermediate switching centers when its Jacksonville international switch is overloaded.

16. PRTC asserts that its proposal includes alternate routing plans to minimize the occurrence of "no circuit" conditions. PRTC explains the disparity in Puerto Rico-Canada circuit projections in the present application and those contained in Comsat's original application to build an international earth station at Cayey, Puerto

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[9] AT&T disagrees with AACR that it must file a Section 214 application to make capacity available to PRTC. AT&T argues that Section 214 only applies where a carrier intends to utilize a new or extended line, which is not the case here. AT&T also disagrees that the international resale restrictions of its Tariff No. 260 apply to service between Puerto Rico and Canada.

[10] *See* Domestic Communications Satellite Facilities, Second Report and Order, 35 FCC 2d 844, 856–59 (1972), *reconsidered*, 38 FCC 2d 665 (1972).

Rico by noting that the latter projections of 25–35 Canada circuits, are not based on overflow routing.[11] [12] PRTC contends that its proposal will not deprive AACR of scarce submarine cable capacity since satellite circuitry is plentiful. It deems ludicrous AACR's contention that dedicating eight circuits for direct service is inefficient or a deprivation of circuitry to the mainland when over 1900 circuits to the U.S. mainland are currently available. Furthermore, PRTC points out that its dedicated circuits will bypass the AT&T Jacksonville switch which is employed for much of the AACR-AT&T, Puerto Rico-U.S. mainland traffic.

17. PRTC maintains that AACR's economic arguments are premised solely on self-interest and are refutable given a history of higher rates for Puerto Rico as a result of AACR's involvement as a "middleman" carrier. PRTC states that, while it earns a negative 5.7% rate of return for foreign traffic settlements with AACR, it can reduce rates for its direct service since traffic levels will be stimulated. PRTC notes that although AT&T's Switched Transit Remuneration Plan has been available since June, 1976, AACR did not seek to use the service and flow through the savings until PRTC filed this application.

18. PRTC challenges the notion that a Commission policy favoring private over public telephone systems means that it should not be allowed to expand its operations. Although PRTC recognizes that such a policy exists as a preference, it points out that the Commission has recognized exceptions—the situation on Puerto Rico being one case. It notes that public ownership is not statutorily proscribed and a government-owned entity (PRTC) was created because of the poor condition of telephone service when AACR owned the system. PRTC states that it is subject to Commission regulation and that its governmental nexus does not generate any more tax savings than what a private corporation could secure with tax credits and shelters.

19. Finally, PRTC maintains that the Section 214 authorization process does not automatically require a hearing upon the filing of a Petition to Deny and that it has presented ample supporting documentation to demonstrate its capacity to serve as well as the likely positive revenue and public service effects which will be generated.

C. *Other Pleadings*

20. In a letter dated March 17, 1982, PRTC states that while it and Teleglobe had originally anticipated that overflow southbound traffic to Puerto Rico would transit the U.S. mainland via AT&T and

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[12] In its informal comments in the current proceeding, Comsat states that PRTC has a need to seek less desirable alternate routes because the Commission has not yet approved Comsat's application to construct an international earth station on Puerto Rico. *See* Applications of Communications Satellite Corporation, *Id.*.

then to the AACR network, Teleglobe now prefers an overflow route via Antigua. PRTC encloses a telex from Teleglobe indicating the willingness of Cable and Wireless (C&W), Antigua's off-island carrier, to handle transit traffic, and the availability of existing and unused capacity to meet demand. AACR argues that the PRTC overflow plan is unclear, with many details to be worked out. AACR objects to bypassing the U.S. mainland-AACR route and claims that the activation of additional Antigua-Puerto Rico circuits will require Section 214 approval. AACR states that it has not consented to participation in such a transiting route which will necessitate the use of its microwave facility that links Puerto Rico and St. Thomas.

21. In response, PRTC contends that the establishment of a southbound overflow route rests with the appropriate foreign correspondent, Teleglobe Canada. PRTC claims that Teleglobe has coordinated a workable route that matches the quality and grade of service performed by mainland transit facilities and argues that there is no shortage of transmission capacity between Puerto Rico and Antigua provided that AACR activates existing microwave circuit capacity.

IV. Discussion

22. In today's companion Order, we certified PRTC as an interstate and foreign carrier authorized to serve points in and reached via the U.S. mainland.[13] We stated that we would consider Section 214 applications filed by PRTC to serve specific foreign points. In light of the determinations made in that Order we now consider the current PRTC application to provide MTS service to Canada.

A. *PRTC Service Between Puerto Rico And Canada Is Reasonably Feasible And Is In The Public Interest.*

23. Section 214 of the Communications Act requires a carrier seeking to serve new points to obtain Commission authorization that additional service is required by the public convenience and necessity. The standards governing the entry of new competitors in a given voice market are set forth in *FCC v. RCA Communications, Inc.*, 346 U.S. 86 (1953) and require that the Commission find that competition is reasonably feasible and is in the public interest. In today's companion Order we determined that competition in the provision of MTS and WATS from Puerto Rico to off-island points is in the public interest.[14] Any entity opposing service by a carrier to a specific off-

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[13] Puerto Rico Telephone Company file Nos. I-P-D-8, I-P-C-48, *supra* note 1.

[14] Puerto Rico Telephone Company, *Id.*

island point has the burden of showing otherwise by clear and convincing evidence.[15] After examination of the record we find that AACR has not met its burden in opposing PRTC's request for authorization to provide MTS service to Canada.

24. A review of traffic data submitted by PRTC and an evaluation of circuit and traffic growth in the Caribbean area shows significant traffic increases. PRTC has applied a 10% growth rate for Puerto Rico-Canada traffic.[16] An evaluation of the actual growth rate of circuits from circuit status reports filed as of October, 1982, confirms an increase in off-island traffic. Similarly, the accompanying documentation in the joint application by AT&T, ITT Communications, Inc.-Virgin Islands and several international record carriers for authorization of the Third Florida-St. Thomas Cable System attests to traffic growth which has generated an average 20% per year growth in demand for Caribbean and South American service.[17] Even a cursory assessment of Carribbean region traffic growth patterns enables us to make a reasonable conclusion that MTS volumes to international points including Canada, will increase in the coming years and that a substantial growth in operational circuitry needs can be expected.

25. Furthermore, our assessment of financial, operational and technical information concerning PRTC's application here and in File Nos. I-P-D-8, I-P-C-48, indicate that PRTC is qualified to provide service to international markets, including Canada.[18] [19] AACR's fear of competitive dislocation by PRTC is unfounded in view of AACR's control of off-island transmission facilities, its pre-existing operating agreements with foreign correspondents and its corporate ties with ITT.

26. We concluded in our companion Order that PRTC's entry into off-island markets will lead to lower rates and better service for the residents of Puerto Rico.[20] The record here persuades us that this will be the case for service to Canada. As a result of more efficient

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[15] *See* MTS and WATS Market Structure, 81 FCC 2d 177, 204; CC Docket No. 78–72, Phase 2, FCC 82–515, adopted November 18, 1982; GTE Satellite Corporation, 90 FCC 2d 1009, 1011.

[16] *See* PRTC application, exhibit 4.

[17] American Telephone and Telegraph Co. *et al.*, 88 FCC 2d 1630, 1634 (1982). Teleglobe Canada has sought to obtain interests in 240 circuits to satisfy its international service requirements in the Caribbean basin.

[19] AACR implies that entry into off-island markets by PRTC, a government owned entity, violates Commission policy and would not constitute full and fair competition with private telecommunications companies. In File Nos. I-P-D-8, I-P-C-48, *supra* note 1 at para. 24–25, we considered and rejected this argument. In our decision there we also rejected AACR's claim that our endorsement of its ownership and operation of Puerto Rico's only domestic earth station was intended to confer upon AACR a *de facto* monopoly in all off-island services. *See* File Nos. I-P-D-8, I-P-C-48, *supra* note 1 at para. 19.

[20] Puerto Rico Telephone Company, File Nos. I-P-D-8, I-P-C-48, *supra* note 1 at para. 31–32.

routing and other expected operational and managerial cost savings which will result from direct service, PRTC was able to propose rates for service to Canada of up to 30% below the rates offered by AACR. Shortly after PRTC filed its application, AACR filed its own reductions matching PRTC's proposed rates.[21] AACR indicates that its revised tariff filing for Puerto Rico/Virgin Islands-Canada telephone service reflects savings fostered by the incorporation of AT&T's Switched Transit Remuneration Plan (STRP).[22] However, AACR had initially been offered the STRP cost savings as early as June, 1976. We believe that it is reasonable to conclude from this that AACR filed its revised tariff, at least in part, as a result of PRTC's application to provide service to Canada. In view of our findings here and in File Nos. I-P-D-8, I-P-C-48, we conclude that the provision of MTS service by PRTC to Canada is in the public interest.

B. *PRTC Is Not Prohibited From Using Comstar.*

27. AACR contends that PRTC may not use the Comstar domestic satellite for international telephone communications between Puerto Rico and Canada until the Commission resolves a number of legal and policy questions. We need not address the specific issues raised by AACR because PRTC is not proposing to use the Comstar domestic satellite for direct transmission to Canada. Under the PRTC plan, domestic satellite circuits will be used solely to carry traffic between Puerto Rico and the U.S. mainland. We have previously authorized the use of domestic satellite circuits for such service.[23] Furthermore, domestic satellites are regularly used to provide the domestic portion of international service and therefore there is nothing new or unique about the PRTC proposal.[24]

C. *AT&T Tariff No. 260 Does Not Prohibit PRTC From Obtaining AT&T Transit Facilities.*

28. AACR also argues that AT&T Tariff No. 260 prohibits the resale of international private lines and therefore PRTC cannot obtain the needed lines from AT&T, at least for service from the U.S. mainland to the Canadian border. Paragraph 6-3-5(c) of the tariff provides:

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[21] *See* All America Cables and Radio, Inc., Transmittal No. 88 to Tariff FCC No. 1 (filed September 21, 1981) (tariff matches PRTC's proposed rates).

[22] *See, supra* note 5; *See also* Establishment of Regulatory Policies For Communications Traffic Transiting the United States, Docket No. 19031, mimeo No. 29209 (released May 5, 1981) (retaining jurisdiction over transiting without additional scrutiny or reporting requirements).

[23] *See* note 8.

[24] See *e.g.*, American Telephone and Telegraph Company, et al. W-P-C-2477-1, released January 28, 1980 (the 1980 Blanket) para. 22 and American Telephone and Telegraph Company, et al. W-P-C-3186, released August 25, 1980 (the 1981 Blanket), para. 21. *See also*, Communications Satellite Corporation, 90 FCC 2d 1205 (1982).

Private line service shall not be used for any purpose for which a payment or other compensation shall be received by either the customer or any user, or in the collection, transmission or delivery or any communications for others. . . Paragraph 2.2 of the tariff applies this prohibition to service from the U.S. mainland to Canada but specifically excludes the prohibition for service between Puerto Rico and the U.S. mainland.

29. Tariff No. 260 presents no bar to the PRTC application. Under the tariff, PRTC will lease only a portion of the San Juan - New York facilities, which is clearly authorized.[25] It states that it will obtain the New York - Canadian border lines under AT&T's "normal international carrier to carrier arrangement" and thus avoid any potential prohibitions in Tariff No. 260 for this part of its service. PRTC gives no reference to any particular contract. However, even in the absence of a specific agreement, we note that PRTC may obtain the necessary facilities between New York and Canada pursuant to AT&T Tariff No. 266.

D. *AT&T Need Not File A Section 214 Application.*

30. PRTC intends to lease lines from AT&T for its service to Canada. AACR contends that AT&T cannot provide the requested service to PRTC because AT&T has failed to file a Section 214 application to make capacity available. Section 214 would apply if AT&T needed to build a new line or extend an existing line to provide the requested service. However, PRTC does not contemplate requesting any service which would require AT&T to construct, acquire, operate or engage in the transmission over or by means of a new or extended line. Therefore, AT&T need not file a Section 214 application.

E. *PRTC Has The Right To Acquire From AACR and AT&T 12 Circuits For MTS Service to Canada.*

31. In our companion Order, we made clear that upon reasonable request, PRTC has a right of access to all available off-island facilities.[26] In the current application, PRTC requests authority to lease 12 voice circuits from AACR and AT&T for MTS service between Puerto Rico and Canada. PRTC will lease the facilities between Puerto Rico and New York pursuant to AACR Tariff No. 3 and AT&T Tariff No. 260. The lines from New York to Canada will be leased from AT&T pursuant to agreement or under AT&T Tariff No. 266. We find that PRTC's request to lease 12 circuits in order to serve the growing communications needs of the residents of Puerto Rico is reasonable and justified by the record. Therefore, having found that off-island MTS service by PRTC to Canada is in the public

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[25] AACR provides circuits between San Juan and the ocean midpoint and AT&T provides circuits between the midpoint and New York.

[26] Puerto Rico Telephone Company, File Nos. I-P-D-8, I-P-C-48, *supra*, at para. 28–29.

interest, we will authorize PRTC to acquire and operate the requested 12 circuits.

32. As part of its proposal, PRTC also requests authority for northbound and southbound overflow routing. However, as AACR correctly points out, a number of questions concerning this part of the proposal remain unanswered. For example, it is unclear from the proposal what facilities PRTC intends to use for southbound routing. It is also unclear under what terms and conditions PRTC intends to use any facilities for overflow routing. We note that PRTC has not reached an agreement with AACR concerning payment of rates to AACR for its participation in overflow routing. In light of these and other problems, we are not at this time authorizing PRTC any overflow traffic routing. However, we will act on a Section 214 application filed by PRTC for overflow routing that complies with the Commission's Rules.[27] We expect all appropriate carriers to cooperate with PRTC in its effort to work out an overflow plan. Should it become necessary, we will prescribe the facilities for overflow routing, as well as the terms and conditions of their availability, upon petition by PRTC.

F. *AACR Need Not Be Given A Full Evidentiary Hearing.*

33. AACR requests that we not act on the PRTC application until after a full evidentiary hearing. Title II of the Communications Act affords no express opportunity for an evidentiary hearing.[28] In the current matter, all parties have had an opportunity to express their views in written form. We have been able to resolve all material questions of fact and law. Therefore, a full evidentiary hearing would serve no useful purpose and AACR's request must be denied.

V. Conclusion

34. We find that PRTC possesses the legal, financial and operational qualifications to provide direct telephone service between Puerto Rico and Canada and that the public will benefit by increased competition for this service. Therefore, we conclude that the public interest, convenience and necessity will be served by a grant of the application.

35. Accordingly, IT IS CERTIFIED that the public convenience and necessity require that the Puerto Rico Telephone Company provide Message Telephone Service (MTS) between Puerto Rico and Canada.

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[27] *See* Section 63.01 of the Commissions Rules. 47 C.F.R. 63.01.

[28] Satellite Business Systems, *et al.* 62 FCC 2d 997, 1066, *reconsideration denied*, 64 FCC 2d 872 (1977), *affirmed sub. nom.*, United States v. FCC 652 F.2d 72, 88–92 (D.C. Cir. 1980).

36. IT IS ORDERED that except to the extent indicated herein the application IS GRANTED and PRTC is authorized to:

(a) lease from AACR and AT&T, 12 voice circuits between San Juan, Puerto Rico and New York, New York; and to lease from AT&T, 12 voice circuits between New York, New York and the Canadian border.

(b) use said facilities to provide MTS service between Puerto Rico and Canada.

37. IT IS FURTHER ORDERED that except to the extent indicated herein, AACR's Petition to Deny IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
WILLIAM J. TRICARICO, *Secretary.*

Service, Satisfactory
Service, Secondary

Commission found proposal of commercial VHF licensee - to establish a fully staffed office/studio facility in New Jersey, and to promote those facilities-sufficient to satisfy the special New Jersey service obligation imposed upon it. Proceeding terminated.

-RKO General, Inc.
Docket No. 19991

FCC 82-559

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
RKO GENERAL, INC. (WOR-TV) New York, New York	Docket No. 19991 File No. BRCT-71
For Renewal of Broadcast License	
MULTI-STATE COMMUNICATIONS, INC. New York, New York	Docket No. 19992 File No. BPCT-4527
For Construction Permit for New Television Broadcast Station	

ORDER

(Adopted: *December 8, 1982*; Released: *March 29, 1983*)

BY THE COMMISSION: COMMISSIONERS FOGARTY, JONES AND RIVERA CONCURRING IN THE RESULT.

1. On April 10, 1974,[1] the above captioned matter was designated for hearing. At that time RKO was also engaged in a contest involving its license renewal application for Station WNAC-TV, Boston, Massachusetts.[2] In light of questions arising in that proceeding, the Commission conditioned any possible grant of RKO's license

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[1] *RKO General, Inc. (WOR-TV)*, 46 FCC 2d 246 (1974).

[2] *RKO General, Inc. (WNAC-TV)*, Docket Nos. 18759-61 (Boston, Massachusetts). Questions of RKO's qualifications were first raised in a third proceeding involving RKO. See *RKO General, Inc. (KHJ-TV)*, Los Angeles, California (Docket Nos. 16679 and 16680).

renewal for Station WOR-TV on the outcome of the Boston proceeding.[3] Ultimately, the Commission concluded that RKO was unqualified to remain the licensee of Station WNAC-TV[4] and that this conclusion compelled a similar determination with respect to RKO's qualifications to remain the licensee of WOR-TV.[5] On appeal, the court affirmed the conclusion reached in the Boston proceeding but held that the narrow ground for disqualification did not automatically warrant RKO's disqualification as the licensee of WOR-TV.[6] It thus remanded the New York proceeding to the Commission with instructions to ascertain specifically the impact of the conclusions reached in the Boston proceeding on RKO's qualifications to remain a licensee of its New York station.

2. On August 19, 1982, before the Commission had an opportunity to consider the above question, the Congress of the United States passed the Tax Equity and Fiscal Responsibility Act of 1982. Section 355 of that Act amends the Communications Act of 1934 and reads as follows:

> "Sec. 331. It shall be the policy of the Federal Communications Commission to allocate channels for very high frequency commercial television broadcasting in a manner which ensures that not less than one such channel shall be allocated to each State, if technically feasible. In any case in which licensee of a very high frequency commercial television broadcast station notifies the Commission to the effect that such licensee will agree to the reallocation of its channel to a community within a State in which there is allocated no very high frequency commercial television broadcast channel at the time such notification, the Commission shall, notwithstanding any other provision of law, order such reallocation and issue a license to such licensee for that purpose pursuant to such notification for a term of not to exceed 5 years as provided in section 307(d) of the Communications Act of 1934."

3. On September 6, 1982, after the bill was signed into law, RKO notified the Commission that it would agree to a reallocation of its license for Channel 9, WOR-TV, New York City, to a site in New Jersey, a State which currently has no operational very high frequency (VHF) commercial television broadcast station. In accordance with the Congressional mandate of Section 355 of the 1982 tax act the Commission has by separate action today ordered the reallocation of Channel 9, New York City, to Newark, New Jersey, and has issued RKO a license for that station for a term of five years.

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[3] *RKO General, Inc. (WOR-TV)*, 69 FCC 2d 461 (1978).

[4] *RKO General, Inc. (WNAC-TV)*, 78 FCC 2d 1 (1980).

[5] *RKO General, Inc. (WOR-TV)*, 78 FCC 2d 357 (1980).

[6] *RKO General, Inc.* v. *FCC*, 670 F. 2d 215, *cert. denied*, 102 S.Ct. 1978 (1982).

4. Consistent with that Order the present proceeding may therefore be terminated[7] and numerous pleadings pending in this proceeding will be dismissed as moot or otherwise disposed of as follows.

5. ACCORDINGLY, IT IS ORDERED, That the Petition for Leave to Amend filed September 26, 1979 by RKO General, Inc. IS GRANTED and the amendment IS ACCEPTED.[8]

6. IT IS FURTHER ORDERED, That the Petition for Leave to Amend filed May 28, 1980 by RKO General, Inc. IS GRANTED and the amendment IS ACCEPTED.[9]

7. IT IS FURTHER ORDERED, That the Petition for Reconsideration filed September 11, 1978 by Multi-State Communications, Inc. IS DISMISSED as moot.

8. IT IS FURTHER ORDERED, That the Motion to Enlarge Issues filed August 25, 1980 by RKO General, IS DISMISSED as moot.

9. IT IS FURTHER ORDERED, That the Petition for Leave to Amend filed January 8, 1980 by Multi-State Communications, Inc. IS DISMISSED as moot.

10. IT IS FURTHER ORDERED, That the Petition for Waiver of Rule filed February 7, 1980 by Multi-State Communications, Inc. IS DISMISSED as moot.

11. IT IS FURTHER ORDERED, That the Petition for Leave to Amend filed June 9, 1980 by Multi-State Communications, Inc. IS DISMISSED as moot.

12. IT IS FURTHER ORDERED, That the Petition for Leave to Amend filed January 12, 1981 by Multi-State Communications, Inc. IS DISMISSED as moot.

13. IT IS FURTHER ORDERED, That the Petition for Intervention and Special Relief filed July 7, 1980 by the New Jersey Coalition for Fair Broadcasting IS DISMISSED as moot.

14. IT IS FURTHER ORDERED, That the Petition for Leave to Intervene and Motion to Open Proceedings for New Applications, filed August 14, 1980 by Crossroads Communications IS DISMISSED as moot.

15. IT IS FURTHER ORDERED, That the Motion to Dismiss Crossroad Communications' Unauthorized Reply to Oppositions to

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[7] Given the explicit legislative directive that a license be issued "notwithstanding any other provision of law," previous questions as to RKO's qualifications to be the licensee of WOR-TV, New York City, and as to the comparative qualifications of Multi-State are no longer relevant to the disposition of this proceeding.

[8] This unchallenged petition reported media related interests of RKO General, Inc. and good cause for its acceptance has been shown.

[9] This uncontested petition provided information on dismissal of certain litigation against General Tire & Rubber Co. and Frontier Airlines, Inc. Good cause for acceptance of this amendment has been demonstrated by RKO.

Petition for Leave to Intervene filed September 10, 1980 by the Broadcast Bureau IS DISMISSED as moot.

16. IT IS FURTHER ORDERED, That the Opposition to Broadcast Bureau's Motion to Dismiss its Reply and Request for Leave to File its Reply filed September 19, 1980 by Crossroads Communications IS DISMISSED as moot.

17. IT IS FURTHER ORDERED, That that Motion to Strike Comments of Senators Bill Bradley and Harrison A. Williams, Jr. filed July 9, 1980 by Multi-State Communications, Inc. IS DISMISSED as moot.

18. IT IS FURTHER ORDERED, That the Petition to Hold in Abeyance filed March 22, 1979 by RKO General, Inc. IS DISMISSED as moot.

19. IT IS FURTHER ORDERED, That the Motion to Expedite WOR-TV Remand Proceeding and Escrow WOR-TV Profits filed November 4, 1982 by Multi-State Communications, Inc. IS DISMISSED as moot.

20. IT IS FURTHER ORDERED, That the application of Multi-State Communications, Inc. for a construction permit and the application of RKO General, Inc. for renewal of license of Station WOR-TV ARE DISMISSED as moot, consistent with our ruling this same date reallocating Channel 9 to a community in New Jersey.

21. IT IS FURTHER ORDERED, That this proceeding is terminated.

Federal Communications Commission,
William J. Tricarico, *Secretary*.

Character Qualifications
Financial Qualifications
Nonprofit Organization
Option
Ownership and Management, Integration of

Review Board affirms Initial Decision that awarded integration credit for directors of a nonprofit, non-stock corporation who will participate in station management, and declined to grant any integration ownership credit based on an unexercised option agreement. Board also declined to add character issue and affirmed the ALJ's grant of summary decision on financial qualifications issue.
–*Roanoke Christian B/cing, Inc.*
BC Docket No. 81–46

FCC 83R-8

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
ROANOKE CHRISTIAN BROADCASTING, INC. Roanoke, Virginia	BC Docket No. 81–46 File No. BPCT-800409KE
WESTERN VIRGINIA TELEVISION COMPANY Roanoke, Virginia	BC Docket No. 81–47 File No. BPCT-790920KH
For a Construction Permit	

Appearances

*Eric L. Berntha*l and *Daniel F. Van Horn*, on behalf of Western Virginia Television Company; and *Joseph E. Dunne*, III, on behalf of Roanoke Christian Broadcasting, Inc.

DECISION

(Adopted: January 25, 1983; Released: January 28, 1983)

BOARD MEMBER JACOBS FOR THE REVIEW BOARD:

1. This proceeding involves the mutually exclusive applications of Roanoke Christian Broadcasting, Inc. (RCB) and Western Virginia Television Company (WVTC) for authority to construct a new UHF

commercial television station to operate on Channel 27 at Roanoke, Virginia. By Hearing Designation Order, Mimeo No. 06597, 46 Fed. Reg. 12841, published February 18, 1981, the applications were designated for hearing on limited financial qualifications issues against both applicants and on the standard comparative issue. By Memorandum Opinions and Orders, FCC 81M-2354, released July 30, 1981, and FCC 81M-2439, released August 6, 1981, presiding Administrative Law Judge Joseph P. Gonzalez (ALJ) granted summary decision for each applicant on its financial issue, and by Initial Decision (I.D.), FCC 82D-46, released June 24, 1982, he granted RCB's application, based on RCB's superior proposal under the comparative criterion of integration of ownership and management.

2. WVTC has filed exceptions to the Initial Decision, and RCB has replied. The Review Board has considered the Initial Decision in light of the exceptions and briefs of the parties, the oral argument held November 18, 1982, and our examination of the record. We adopt the findings of fact in the Initial Decision, except as modified herein, and affirm the ALJ's ultimate conclusion that grant of RCB's application will better serve the public interest, convenience and necessity.

3. In its exceptions, WVTC treats four matters which it believes were incorrectly decided by the ALJ and warrant either awarding an immediate grant to WVTC or remanding the proceeding for further evidentiary hearing. Only summary discourse on these arguments is required.

4. First, WVTC urges that the ALJ erred in awarding any integration credit to RCB because there is no reasonable assurance that RCB will be able to effectuate its proposal. RCB is a non-profit non-stock Virginia corporation controlled by a four-member Board of Directors, all of whom are proposed as integrated "owners". Messrs. Llewellyn L. Fischer, Randolph Kingery, and Richard Stroupe will serve full-time (minimum of 40 hours per week) as general manager, sales director, and program director, respectively, and Mr. Gregory Harrell will serve part-time (minimum of 20 hours per week) as the station's comptroller. I.D., paras. 6, 7, 11, 14, 17. While conceding that being a non-stock corporation does not necessarily preclude an applicant from receiving integration credit, WVTC argues that Commission policy permits such credit for integrated directors only where there is a "reasonable prospect of stability in the ownership and management arrangements" and where they have "personal interest and responsibility comparable to owners," citing *Farragut Television Corporation*, 8 FCC 2d 279, 282, 10 RR 2d 50, 54–55 (1967), and asserts that the evidence of record shows that RCB does not meet this "test". The ALJ carefully considered this matter and concluded that RCB's directors had demonstrated a personal interest and responsibility, as well as a long-term commitment, comparable to that of a principal who has a financial interest in a venture. I.D.,

paras. 34–35, Tr. 63–64, 72–77, 122–124, 135–136. We believe that this conclusion is adequately supported by the record, including significant and unrebutted testimonial evidence offered by each of RCB's four directors. *Id.* In so concluding, we reject WVTC's view that there are any talismanic indicia of stability or interest, such as previous common endeavors, which directors must proffer in order to receive integration credit. As with any other integration effectuation analysis, the ultimate conclusion must be based on weighing all available factors and evidence of record. *See Central Texas Broadcasting Co., Ltd.*, 90 FCC 2d 583, 596, 51 RR 2d 1478, 1487 (Rev. Bd. 1982). RCB has provided reasonable assurance that it will effectuate its integration proposal, and has fully met the requirements of *Farragut Television Corporation*, *supra*, and its progeny. Hence, it is entitled to credit for 75% full-time integration and 25% part-time integration.[1]

5. WVTC's second exception is that it was entitled to approximately 10% full-time integration credit for the proposed integration of Mr. E. Dana Cox, Jr. and WVTC's full-time general manager. The ALJ denied all integration credit for Mr. Cox, holding that he lacked any cognizable ownership interest in WVTC at the time that its comparative case was frozen for adjudicatory purposes.[2] I.D., para. 32. We affirm the ALJ. Mr. Cox's putative 10% ownership interest in WVTC was based on an unexercised contingent option agreement whereby Mr. Cox could purchase 7500 shares of WVTC's stock at such future time as WVTC is no longer a Subchapter S corporation under the Internal Revenue Code and "the Company shows a profit from its operations." WCTV Exh. III, Att. C, p. 1. In two recent decisions, the Commission has indicated that it will not give any integration ownership credit based on unexercised option agreements because the "ownership" is too tenuous and speculative. *Gilbert Broadcasting Corp.*, 91 FCC 2d 450 52 RR 2d 429, 444 n. 66 (1982); *Peoples Broadcasting Corp.*, FCC 83R-5, released January 25, 1983. While the Commission credited certain option agreements in the distant past for ownership purposes, *e.g.*, *The Radio Station KFH Co.*, 19 FCC 1119, 1148, 11 RR 1, 110 (1955), the Commission now holds that all unexercised option agreements are - by definition - "optional" and therefore can provide no reasonable assurance that

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[1] The ALJ incorrectly translated Mr. Harrell's 25% part-time integration proposal into 12.5% full-time credit and concluded that RCB was entitled to 87.5% full-time quantitative integration credit. I.D., para. 39. This methodology for evaluating integration credit has been rejected. *See Ottumwa Broadcasting Co.*, 52, RR 2d 1447 (Rev. Bd. 1982); *Van Buren Community Service*, 87 FCC 2d 1018, 1022 n. RR 2d 115, 119 n. 1 (Rev. Bd. 1981).

[2] By an amendment filed July 8, 1981, WVTC reported that on July 6, 1981, Mr. Cox signed a subscription agreement to purchase 4400 shares of WVTC's stock. WVTC claimed no comparative credit for this action, and the ALJ accepted the amendment, subject to that limitation, by Order, FCC 81M-2341, released July 29, 1981.

the optionee will ever, in fact, become an owner. To receive ownership integration credit, one must possess indicia of present ownership, not merely a chance of future ownership. The prudence of the Commission's new approach is aptly illustrated by the instant case, in which the exercise of Mr. Cox's option to become an owner is itself conditioned on the prior occurrence of two other events, neither of which is within his control. The viability of Mr. Cox's ownership interest is obviously too speculative to warrant any credit. Hence, without a "meaningful convergence of ownership and station management", *Snake River Valley Television, Inc.*, 26 FCC 2d 380, 387, 20 RR 2d 644, 654 (Rev.Bd. 1970), WVTC can gain no integration credit for Mr. Cox's managerial role.

6. Were this the sum of WVTC's contentions, RCB would be the clear comparative choice at this point, because it has a decisive comparative advantage over WVTC under the important integration criterion. However, WVTC next makes two remand arguments, either of which would forestall immediate grant of RCB's application if remand were ordered. First, WVTC challenges the ALJ's refusal in Memorandum Opinion and Order, FCC 81M-2202, released July 17, 1981, to designate a character issue against RCB because of RCB's "improper and unethical misappropriation" of WVTC's terrain profile graphs for use in its own application. Second, WVTC urges that the ALJ improperly granted summary decision to RCB on its limited financial issue in Memorandum Opinion and Order, FCC 81M-2439, released August 6, 1981, and that the proceeding should be remanded to determine whether RCB is indeed financially qualified to be a Commission licensee.

7. In denying the requested character issue, the ALJ emphasized that the Commission had already had the facts concerning RCB's use of WVTC's graphs before it, prior to hearing designation, but had apparently "decided not to designate a character issue against RCB."[3] WVTC argues that this pre-designation litigation did not squarely address the question of whether a hearing issue would be appropriate and that the silence of the Hearing Designation Order, *supra*, on this matter cannot be read as holding that a character issue may not be added. Indeed, WVTC maintains that the Commission's "not condoning" RCB's conduct (see note 3, *supra*) suggests that this matter is pertinent to RCB's qualifications to be a licensee, since an applicant's past conduct in broadcast-related matters has predictive value for the future and since concern may be raised even by conduct "which only violates the Commission's sense of propriety

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[3] By Memorandum Opinion and Order, 47 RR 2d 1067 (Broadcast Bur. 1980), *rev. denied*, FCC 80-541, released October 2, 1980, the Commission denied WVTC's petition to return or dismiss RCB's application because of this use, holding that acceptance of RCB's application for filing "should not be read as a condonation of the practice of copying and using another's work product, but if there is recourse against such a practice, it lies in a civil court action." 47 RR 2d at 1068.

and ethics" (WVTC Br., pp. 15–16), citing *Melody Music, Inc. (WGMA)*, 2 FCC 2d 958, 962 (1966). While WVTC is procedurally correct that the decisions cited in note 3, *supra*, and the Hearing Designation Order herein did not focus on the propriety of designating a character issue against RCB, we nevertheless conclude that the ALJ was substantively correct in not adding the requested issue. For, in a very similar case, the Commission has recently declined to dismiss the competing application of a copying applicant or designate a character issue against it in a Hearing Designation Order, *Gatlinburg Broadcast Communications, Inc.*, Mimeo No. 6447, released September 24, 1982 (Broadcast Bur.), and in conjunction with an Order, FCC 82-560, released December 15, 1982, in which the Commission declined to grant review of that action, Commissioner Stephen A. Sharp issued a concurring statement in which he makes clear that "My colleagues . . . believe that [this conduct] is a matter of private rights and is thus inappropriate for Commission action." This is analogous to other recent Commission pronouncements in which the Commission has declared that certain allegedly improper conduct can only be properly adjudicated in another forum in the first instance. *E.g.*, *Kaye-Smith Enterprises*, 90 FCC 2d 27, 39, 51 RR 2d 839, 848 (1982) (perjury allegations pertaining to civil lawsuit must first be resolved in court of competent jurisdiction); *WHW Enterprises, Inc.*, 89 FCC 2d 799, 806–807, 51 RR 2d 409, 414 (Rev. Bd. 1982) (Commission customarily refuses to become embroiled in debtor/creditor or other private commercial rhubarbs involving application of state law); *Intercontinental Radio, Inc.*, 88 FCC 2d 819, 823, 50 RR 2d 1073, 1077 (1981) (longstanding policy not to interfere in matters of alleged violations of federal law where authority charged with responsibility of administering those laws has not yet been presented with adjudication opportunity). In the instant case, although the ALJ denied addition of a character issue against RCB, he did condition RCB's grant on the outcome of the pending civil litigation against RCB initiated by WVTC in the Virginia courts. I.D., Ordering Clauses. This action was consistent with Commission precedent and is the most that WVTC could properly expect.

8. As to RCB's financial qualifications, in granting summary decision in RCB's favor, the ALJ carefully reviewed the amendments that RCB had filed to cure the defects in its financial proposal noted in the Hearing Designation Order and concluded that they were satisfactory. However, WVTC disputes the ability of Randolph Kingery to fulfill his $5000 loan commitment, the adequacy of two loan commitment letters from the First National Exchange Bank, and the failure of RCB's financial plan to provide for the contingent liability that RCB would face if it loses the civil suit noted in paragraph 7, *supra*. WVTC's arguments fail on all counts. *See Kaiser Broadcasting Corp.*, 62 FCC 2d 246, 39 RR 2d 741 (1976), which clarifies that Kingery does indeed have sufficient net liquid assets to

meet his loan commitment; *Scott & Davis Enterprises, Inc.*, 88 FCC 2d 1090, 50 RR 2d 1251 (Rev. Bd. 1982), which disposes of similar bank loan objections as speculation and quibbling over details; and *Ottumwa Broadcasting Co., supra*, which holds that concern about contingent litigation liability is premature prior to an adverse judicial determination. There not being any "genuine issue of material fact" concerning RCB's financial qualifications, we affirm the ALJ's grant of summary decision on this matter. Section 1.251 of the Commission's Rules, 47 CFR 1.251.

9. Having denied all of WVTC's exceptions and having affirmed the ALJ's conclusion that RCB's proposal to integrate ownership and management at its proposed station is clearly superior to WVTC's proposal, we likewise affirm the ALJ's ultimate conclusion that grant of RCB's application will better serve the public interest, convenience and necessity.

10. ACCORDINGLY, IT IS ORDERED, That the motion for leave to amend filed by Roanoke Christian Broadcasting, Inc. on July 19, 1982 IS GRANTED;

11. IT IS FURTHER ORDERED, That the application of Roanoke Christian Broadcasting, Inc. (File No. BPCT-800409KE) for a construction permit to establish a new television broadcast station at Roanoke, Virginia IS GRANTED, SUBJECT TO THE CONDITION that this grant SHALL NOT PRECLUDE the Commission from taking such further action as it considers appropriate in light of the results of the pending civil action in the Circuit Court for the City of Roanoke, *West Virginia Television Company, Plaintiff* v. *Roanoke Christian Broadcasting, Inc., Defendant* (Order Law No. 6214), and the application of Western Virginia Television Company (File No. BPCT-790920KH) IS DENIED.

JEROLD L. JACOBS, *Member, Review Board*,
FEDERAL COMMUNICATIONS COMMISSION.

FCC 82D-46

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
ROANOKE CHRISTIAN BROADCASTING, INC. Roanoke, Virginia	BC Docket No. 81–46 File No. BPCT-800409KE
WESTERN VIRGINIA TELEVISION COMPANY Roanoke, Virginia	BC Docket No. 81–47 File No. BPCT-790920KH
For a Construction Permit	

Appearances

Robert J. Miller, *John Lockie*, *Tedson J. Meyers* and *Michael W. Faber* on behalf of Western Virginia Television Company; *Joseph E. Dunne, III* on behalf of Roanoke Christian Broadcasting, Inc.; and *Daniel Sarno* and *Daniel Simms* on behalf of Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH P. GONZALEZ

(Issued: June 18, 1982; Released: June 24, 1982)

Preliminary Statement

1. This proceeding involves the mutually exclusive construction permit applications of Roanoke Christian Broadcasting, Inc. (RCB) and Western Virginia Television Company (WVTC) for a new commercial television station to operate on Channel 27, Roanoke, Virginia. By Order released February 6, 1981 (BC 06597), the Commission, by the Chief, Broadcast Bureau, acting pursuant to delegated authority, designated these applications for hearing in a consolidated proceeding (46 FR 12841, published February 18, 1981) on the following issues:

1. To determine, with respect to RCB:
   - (a) Whether at least $72,800 upon which the applicant had relied from PTL Club will be available to it;
   - (b) Whether R. W. Bowers and Randolph Kingery have net liquid assets sufficient to meet their commitments to the applicant; and

(c) Whether, in light of the evidence adduced pursuant to (a) and (b) above, the applicant is financially qualified.

2. To determine, with respect to WVTC:
   (a) Whether at least $660,000 represented by stock subscriptions will be available to the applicant;
   (b) Whether, in light of the evidence adduced pursuant to the foregoing issue, the applicant will have available to it a loan of at least $250,000 from First National Exchange Bank; and
   (c) Whether, in light of the evidence adduced pursuant to (a) and (b) above, the applicant is financially qualified.
3. To determine which of the proposals would, on a comparative basis, better serve the public interest.
4. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

2. On July 8, 1981, WVTC filed a Motion for Summary Decision of WVTC's pending financial issue (Issue 2 above). By Memorandum Opinion and Order (FCC 81M-2354, released July 30, 1981), the Presiding Judge granted WVTC's motion for summary decision, and the financial issue was resolved in WVTC's favor.

3. RCB filed a Motion for Summary Decision of the financial issue designated against it on April 6, 1981, as supplemented on July 9, 1981 (Issue 1 above). In an oral decision announced July 29, 1981, and confirmed in a Memorandum Opinion and Order, FCC 81M-2439, released August 6, 1981, the Presiding Judge granted RCB's motion for summary decision of the financial issue, and the issue was resolved in RCB's favor.

4. On March 20, 1981, WVTC sought the designation against RCB of an issue involving the allegedly unauthorized use by RCB of profile graphs submitted by WVTC. The Presiding Judge refused to designate the requested issue against RCB, but specified that "any grant of a permit to RCB will be conditioned so as not to preclude any Commission action taken because of the result of the pending Commonwealth of Virginia civil suit against Roanoke Christian Broadcasting, Inc."

5. A prehearing conference was held in this proceeding on April 3, 1981. Hearing sessions were held on July 28 and 29, 1981, and the record was closed on July 29, 1981. Proposed findings of fact and conclusions of law were filed by both applicants on September 4, 1981, and replies were filed on September 25, 1981.

Findings of Fact

Roanoke Christian Broadcasting, Inc. (RCB)

6. RCB is a non-profit, non-stock Virginia corporation publicly supported and authorized to engage in the business of constructing

and operating a broadcast facility. RCB is controlled by a board of directors composed of the following four directors: Llewellyn L. Fischer, President and Chairman of the Board of Directors; Gregory V. Harrell, Director; Randolph Kingery, Director; and Richard L. Stroupe, Director. Directors of RCB are elected by the other members of the Board of Directors for an indefinite term and may unilaterally resign or be removed at any time by a majority vote of the remaining directors (RCB Exhibit I, pp. 1–2).

Llewellyn L. Fischer

7. Mr. Fischer, in addition to being RCB's president and chairman of the board of directors, is also RCB's chief operations officer, with responsibility for the day-to-day managerial decisions. In the event that RCB is the successful applicant, Mr. Fischer will serve as general manager of the proposed station, and will direct the operations of the station. Mr. Fischer proposes to work full time at the station, devoting a minimum of 40 hours a week to his duties at the station (RCB Exhibit II).

8. Llewellyn Fischer was born in Clifton Forge, Virginia, and while still a child moved to Norfolk, Virginia. He attended Old Dominion College in Norfolk, and worked for the United States Government in Norfolk until he retired in December 1975. At the time of his retirement, Mr. Fischer was a division director, supervisory industrial specialist (RCB Exhibit III, p. 1). While in Government service, he was responsible for the performance of a large staff of over 30 engineers and other technical personnel (RCB Exhibit III, p. 1), and was required to formulate operating budgets as well as operate under "severe budgetary limitations" (Tr. 50). Mr. Fischer is a former chairman of the Tidewater Chapter of the Society of Logistics Engineers (RCB Exhibit III, p. 2). In 1975, after retiring from employment with the United States Government, Mr. Fischer moved to Eagle Rock, Virginia, a community within the predicted Grade B service area of RCB's proposed station (RCB Exhibit III, p. 2).

9. While a resident of Norfolk, Mr. Fischer was an Elder and Sunday School Superintendent at the Calvin Presbyterian Church, and between 1955 and 1960 was President of the Tidewater Presbyterian Sunday School, Superintendent's Conference. He was a Scout Master between 1948 and 1949, and an International Representative, Boy Scouts of America between 1949 and 1952. In addition, he served as Pilot and Supply Officer for the Civil Air Patrol between 1948 and 1952, and Unit Leader, U.S. Government United Way Campaign for several years (RCB Exhibit III, p. 2).

10. Since moving to Eagle Rock, Virginia, Mr. Fischer has been a member of the Botetourt County Chapter, Kiwanis International from 1975 to 1978, served as Vice President of Roanoke Valley Camp, Gideon's International between 1980 and 1981, and as a

Volunteer Supervisor for a candidate for Federal office (RCB Exhibit III, p. 2). In addition, Mr. Fischer organized and chaired a group that arranged a benefit performance for a religious group (RCB Exhibit III, p. 2).

Randolph Kingery

11. Randolph Kingery, a director of RCB, proposes to serve as sales director for the new television station, and will devote a minimum of 40 hours a week to his duties at the station (RCB Exhibit II, p. 1). He will oversee the station's day-to-day sales, hold sales meetings, and maintain a file on regulations for advertising (Tr. 129).

12. Mr. Kingery is a life long resident of Roanoke. He graduated from a local high school in 1963, and became a cement contractor (RCB Exhibit III, p. 5). He subsequently formed a partnership with his brother under the name of Kingery Brothers Excavating (RCB Exhibit III, p. 5). In 1981, he became the 51 percent owner of Kingery Brothers Country Store (RCB Exhibit III, p. 5; Tr. 125–26).

13. Mr. Kingery estimates that he currently works 50 hours a week at Kingery Brothers Excavating and devotes an additional 10 hours a week to the management of Kingery Brothers Country Store (Tr. 126). In the event that RCB is the successful applicant, Kingery will continue to devote 10 hours a week to managing the store (Tr. 127, 135), but will sell his interest in Kingery Brothers Excavating so that he can fulfill his full-time commitment to RCB (Tr. 135).

Richard L. Stroupe

14. Richard Stroupe, a director, proposes to serve as full-time program director at the station (RCB Exhibit II, p. 1). As program director, he will oversee the Program Department and develop its budget, and he will also have the responsibility for implementing all of the programs of the station and for scheduling and receiving as well as maintaining the film library (Tr. 86–87).

15. Mr. Stroupe is a native of Roanoke, Virginia, and continues to reside there. He graduated from a local high school, and attended Hampden-Sydney College during the years 1957 and 1958 and the University of Virginia School of General Studies from 1959 thru 1961. He also attended the Weaver School of Real Estate in 1968, and is a 1975 graduate of Realtors Institute of the University of Virginia (RCB Exhibit III, p. 5).

16. Mr. Stroupe is presently an associate realtor with Cornell, Inc., realtors in Roanoke, Virginia. He was formerly associated with OAB Realty, Inc., Roanoke (RCB Exhibit III, p. 6). In the event that RCB is the successful applicant, Mr. Stroupe will continue to be sought out by a few of his former realty clients; these contacts will, however, be referred to realty brokers, but Mr. Stroupe will receive a portion of any sales commission (Tr. 77–78). Mr. Stroupe does not

anticipate that these contacts with former clients will occur during regular office hours (Tr. 78).

Gregory V. Harrell

17. Gregory Harrell, a director of RCB, will serve as the station's comptroller and will devote at least 20 hours a week to the station (RCB Exhibit II, p. 1; Tr. 115). Mr. Harrell will be involved in establishing and supervising the station's accounting and payroll practices and procedures (RCB Exhibit II, p. 1).

18. Mr. Harrell was born in Waverly, Virginia, and has lived his entire adult life in Roanoke. He graduated from the National Business College of Roanoke with an AA degree in Accounting and became a Certified Public Accountant in 1968. He also attended the Roanoke College evening program, Salem, Virginia, where he majored in accounting (RCB Exhibit III, p. 3). Mr. Harrell is presently a partner in a CPA firm located in Roanoke, Virginia (RCB Exhibit III, p. 3), and devotes approximately 55 hours a week to his duties with the firm (Tr. 120). In addition, Mr. Harrell occasionally conducts seminars, which are approximately two hours long and require two hours of preparation (Tr. 120). Mr. Harrell has also lectured (RCB Exhibit III, p. 4).

19. Mr. Harrell is a member of a number of professional organizations. In addition, he was Budget Chairman in 1979 for the Mountain View PTA, and formerly served as President and President-elect, Kiwanis Club of Williamson Road and as Lieutenant Governor, 2nd Division, Capital District, Kiwanis International from 1980 to 1981, and from 1978 to 1979, he served as Director of the Mental Health Association of Roanoke. In 1979, he was Director of the Festival in the Park. In addition, Mr. Harrell has held several positions with the United Methodist Church (RCB Exhibit III, p. 4).

20. Mr. Harrell devotes 55 hours a week to his accounting practice (Tr. 120), 6 hours a week to his Kiwanis activities, and 10 hours a week to his church duties (Tr. 120–21). Mr. Harrell will reduce the time spent on his CPA practice to approximately 42 hours a week in the event that RCB is the successful applicant (Tr. 124).

21. Neither RCB nor its officers or directors own or have any ownership interest in any authorized broadcast facility or any other media of mass communications (RCB Exhibit I, p. 2).

22. RCB will obtain a standby emergency generator of sufficient capacity to allow RCB to continue to broadcast service at substantially full power for an indefinite period of time if an emergency interrupts electrical power to its transmitter site (RCB Exhibit IV, p. 1).

Western Virginia Television Company (WVTC)

23. WVTC is a Virginia corporation currently operating under Subchapter S status (WVTC Exhibit III, Att. C).

Preliminary Matter

24. WVTC claims a full-time integration credit for E. Dana Cox, Jr., its current general manager, on the basis of an option held by Mr. Cox to purchase stock in WVTC. It contends that proposed management level personnel with similar stock options have been found by the Commission to be principals under the standard comparative issue; and that WVTC is therefore entitled to a full-time integration credit for its general manager, E. Dana Cox, Jr. which, it submits, is qualitatively enhanced by Cox's demonstrated success in broadcast management and his sensitivity to local needs.

25. Although the Presiding Judge disagrees with WVTC's claim for an integration credit for E. Dana Cox, Jr., he has decided to include finding of facts relative to E. Dana Cox, Jr. in the event that his decision to deny WVTC an integration credit for Mr. Cox is overturned on appeal.

E. Dana Cox, Jr.

26. E. Dana Cox, Jr. currently holds and has indicated that he intends to exercise an option to purchase 7500 shares of WVTC's common stock at $10.00 per share (WVTC Exhibit III, Att. C; Tr. 138, 153). The option may be exercised by Mr. Cox during the period of his continuous employment by the company, and after the company shows a profit from its operations and not until the company terminates its status as a Subchapter S corporation (WVTC Exhibit III, Att. C).

27. Mr. Cox is presently a resident of Roanoke, Virginia (WVTC Exhibit III, Att. A). Mr. Cox's resume indicates that he graduated from secondary schools in Columbus, Ohio, and received BS and MA degrees in Radio-TV-Speech-Education from Ohio State University, Columbus, Ohio, in 1960 and 1963, respectively. In addition, Mr. Cox received certificates in Supervisory Management, Financial Management, and Rights, Responsibilities and Regulation of Broadcasting from the Educational Broadcasting Institute, and a certificate in Long Range Systems and Financial Planning from the American Management Association, Toledo, Ohio (WVTC Exhibit III, Att. C).

28. Prior to becoming general manager of WVTC on June 1, 1979, Mr. Cox was Executive Director/General Manager of Smoky Hills Public Television Corporation, Hays, Kansas from 1978 to 1979. In that position, he was responsible for the preparation of and activities associated with the filing of an FCC application and appropriate FCC forms, and his duties included funding and staffing the station, construction design and liaison with Federal and State governmental units. Mr. Cox was self-employed as a broadcast consultant from 1976 to 1978, and from 1972 to 1976, he was vice president and general manager of station WGTE-TV, Toledo, Ohio. From 1966 to 1972, Mr. Cox was vice president and general manager

at WBRA-TV, Roanoke, Virginia. Mr. Cox served as general manager of WGSF-TV, Newark, Ohio from 1963 to 1966, and from 1962 to 1963 he was production manager for WCMU-TV, Mt. Pleasant, Michigan. He also worked as producer-director for the Columbus, Ohio public schools from 1960 to 1962, and for WOSU-TV, a public broadcast station in Columbus. From 1957 to 1960, Mr. Cox was producer-director for station WBNS-TV, Columbus, Ohio (WVTC Exhibit III, Att. C).

29. Mr. Cox has been a member of numerous committees and professional organizations. They are as follows: the Executive Committee, Central Educational Network; the Executive Committee, Ohio ETV Affiliates, Inc.; the Long Range Task Force Committee on Educational Television (Roanoke); the Governor's Advisory Council on Higher Education (Roanoke); the Governor's Advisory Technical Committee on Educational Television (Roanoke); and the FCC's National Industrial Advisory Committee (Roanoke Operational Area). In addition, Mr. Cox actively participated in several Ohio professional organizations while working at television stations in Ohio, and has been a member of the National Association of Educational Broadcasters, the National Academy of Television Arts and Sciences, and the American Association of University Professors (WVTC Exhibit III, Att. C).

30. Neither WVTC nor its officers or directors own or have any ownership interest in any authorized broadcast facility or any other media of mass communications.

Conclusions of Law

Diversity of Ownership of Media of Mass Communications

31. None of the applicants has any interests, ownership or otherwise, in any media of mass communications. Accordingly, neither applicant is entitled to a diversification preference under the comparative criteria.

Integration

WVTC

32. WVTC's claim of an integration credit for E. Dana Cox, Jr. is rejected. To be accorded credit for integration there must be a "meaningful convergence of ownership and station management." See *WVOC, Inc.*, 45 FCC 2d 420, 29 RR 2d 893 (Rev. Bd. 1974). Mr. Cox presently has no ownership interest in WVTC. Although he has an option to buy 7500 shares of stock in WVTC, his right to exercise the option is contingent on the following: (a) WVTC is no longer a Subchapter S corporation; and (b), the station is profitable. Both contingencies may never be realized, and his "ownership right" is therefore highly speculative and conjectural, since his right to exercise his option is dependent upon events which may never occur.

In view of these conditions, Cox's intention to exercise his option has little significance. See *Cherry and Webb Broadcasting Company*, 19 FCC 667 (1955); *Marsh Media, Ltd.*, 68 FCC 2d 712 (1978). The Presiding Judge finds that in the case of Mr. Cox, the necessary convergence of ownership and station management required for an integration credit is absent; and that WVTC is not entitled to an integration credit for the proposed service of its general manager, E. Dana Cox, Jr.

33. Finally, even if Cox were found to have an ownership interest in WVTC, the Cox integration proposal is too nebulous to warrant credit. He is described simply as WVTC's general manager. There is no indication in the record of the hours he intends to spend on his duties at the station or any indication of the nature of these duties. See *Lorenzo W. Milam and Jeremy D. Lansman, a Partnership, et al.*, 6 FCC 2d 198 (Rev. Bd. 1966); *Lorain Community Broadcasting Co., et al.*, 13 FCC 2d 106 (Rev. Bd. 1968).

RCB

34. RCB is composed of four directors, all of whom propose to be integrated into the management of the station. Each of the directors has expressed a long term commitment to RCB (Tr. 64, 98, 123, 136), as well as a concern and willingness to see that RCB, if it is awarded the license, is successful in operating the proposed station. Mr. Fischer, who will devote a minimum of 40 hours a week to the station, testified that he has devoted 3 1;2 years of volunteer work to RCB and committed $9,000 in loans and contributions to RCB (Tr. 63–64). In addition, he traveled to El Paso, Texas at his own expense to acquaint himself with the television business (Tr. 63). Mr. Kingery, who will also devote a minimum of 40 hours a week to the station, indicated that he intends to sell his share of the family's excavating business in order to fulfill his pledge to RCB, and Mr. Stroupe, who assisted in the ascertainment interviews, reviewed the application and amendments, and was involved in the formulation of preparing RCB's proposal (Tr. 72–74), will apparently abandon for the most part his real estate practice, and work full time for the station. Mr. Harrell, who intends to work part-time at the station, will reduce the number of hours spent on his accounting practice to approximately 42 hours a week in order to meet his 20 hours a week commitment to RCB (Tr. 124).

35. RCB's directors have demonstrated a personal interest and responsibility, as well as a long term commitment to RCB comparable to that of a principal who has a financial interest in a venture. Accordingly, the Presiding Judge specifically finds that RCB's directors are entitled to be treated as owners for purposes of determining the degree of RCB's proposed integration. See *Farragut Television Corporation*, 5 FCC 2d 93 (Rev. Bd. 1966).

36. Mr. Fischer will serve as RCB's full-time general manager,

Mr. Kingery as full-time sales director, and Mr. Stroupe as full-time program director. These positions are management and/or supervisory, and the Commission accords them particular weight. See *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 395 (1965). The Presiding Judge concludes, therefore, that RCB is entitled to a quantitative integration of 75 percent on the basis of the proposed integration of Messrs. Fischer, Kingery and Stroupe.

37. The 75 percent quantitative integration credit accorded RCB for the proposed integration of these three individuals is enhanced by their local residence, diminished somewhat by the fact that Mr. Fischer resides within the proposed service area but not in the city of license, and is further enhanced, to a moderate degree, by the fact that Mr. Fischer has been involved in civic affairs in the Roanoke area. None of these gentlemen has any prior broadcast experience. However, all of them have held positions of responsibility in the public or private sector. Although their lack of broadcast experience may prove to be a handicap initially, their past accomplishments and their strong commitment to RCB would seem to indicate that they will be able to overcome this initial handicap and manage the station successfully.

38. Gregory Harrell proposes to devote a minimum of 20 hours a week to the station as comptroller or finance director (RCB Exhibit II, p. 1). To meet this commitment, Mr. Harrell intends to reduce the number of weekly hours devoted to his accounting practice from 55 to 42. He will, however, continue to devote 10 hours a week to other professional as well as civic commitments. Although the number of hours devoted each week to these various activities clearly amounts to a full schedule, there has been no showing in the record that Mr. Harrell is either unwilling to devote such a considerable amount of time to these activities, or that such a schedule is physically impossible. Absent some indication in the record that such a schedule is impossible or unrealistric, Harrell's stated intention, given under oath, to devote 20 hours a week to RCB will be accepted as fact, and RCB will be given credit for the part-time integration of Gregory Harrell. RCB is entitled to an additional 12.5 percent quantitative integration credit for the proposed integration of Mr. Harrell as RCB's comptroller. See *Midwest Broadcasting Company*, 70 FCC 2d 1489 (Rev. Bd. 1979). The 12.5 percent quantitative integration credit is enhanced to only a slight degree by Mr. Harrell's local residence and involvement in civic affairs. See *Enterprise Broadcasting, Inc.*, 56 FCC 2d 352 (Rev. Bd. 1975).

39. WVTC warrants no integration credit for the participation of Mr. Cox as general manager. RCB is entitled to a total quantitative integration credit of 87.5 percent. Furthermore, RCB's quantitative integration credit is enhanced in the case of Messrs. Stroupe and Kingery to a substantial degree because of their local residence, and to a moderate degree by Mr. Fischer's residence within the proposed

service area and his involvement in civic affairs in the Roanoke area. RCB is also entitled to a slight enhancement of the integration credit for Mr. Harrell on the basis of his local residence and his involvement in the civic affairs of Roanoke.

40. No preference will be given to RCB over WVTC for its intention to employ an auxiliary generator, since such a factor is considered of decisional significance only in comparative AM and FM broadcast proceedings. See *Addendum to Policy Statement of July 28, 1965 on Comparative Broadcast Hearings*, 2 FCC 2d 667 (1966).

Ultimate Conclusion

41. RCB is clearly the preferred candidate under the standard comparative issue. It proposes a substantial degree of integration, which is qualitatively enhanced in the manner described above. WVTC does not propose to integrate any of its ownership. Accordingly, the Presiding Judge finds that RCB's proposal will offer the best practical service to Roanoke, and RCB's application will be granted. See *WLCY, Inc.*, 17 FCC 2d 338 (Rev. Bd. 1969); *Bill Garrett Broadcasting Corp.*, 16 FCC 2d 415 (1969).

Rulings

IT IS ORDERED that the motion to strike entered on the record by Western Virginia Television Company at the hearing IS GRANTED, and all references to E. Dana Cox, Jr. as a shareholder of Western Virginia Television Company ARE STRICKEN.

IT IS FURTHER ORDERED that unless an appeal from this Initial Decision is taken by a party, or the Commission reviews this Initial Decision on its own motion in accordance with the provisions of Section 1.276, 47 C.F.R. 1.276, the application of Roanoke Christian Broadcasting, Inc. (BC Docket No. 81–46, File No. BPCT-800409KE) for a construction permit to operate a new commercial television station in Roanoke, Virginia on Channel 27 IS GRANTED; and the application of Western Virginia Television Company (BC Docket No. 81–47, File No. BPCT-790920KH) IS DENIED.[1]

AND IT IS FURTHER ORDERED that the permit for Channel 27, Roanoke, Virginia IS ISSUED to Roanoke Christian Broadcasting, Inc. SUBJECT TO the following condition:

> That the grant of the permit to Roanoke Christian Broadcasting, Inc. for Channel 27, Roanoke, Virginia, shall not preclude the Commission from taking such further action as it considers appropriate in light of the results of the pending civil action in the

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[1] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Circuit Court for the City of Roanoke, *Western Virginia Television Company, Plaintiff* v. *Roanoke Christian Broadcasting, Inc., Defendant* (Order Law No. 6214).

JOSEPH P. GONZALEZ, *Administrative Law Judge,*
FEDERAL COMMUNICATIONS COMMISSION.

Common Carrier, Resale Carrier
Forfeiture, Common Carrier Violation

Application for review of *Memorandum Opinion and Order* imposing forfeiture for willful refusal to answer Commission inquiries regarding service complaints denied for failure to support claim of inability to pay. Forfeiture reduced *sua sponte*, where evidence shows carrier has filed bankruptcy petition. – *Transnational Network Inc.*

FCC 82–538

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of TRANSNATIONAL NETWORK, INC., Apparent Liability for Forfeiture	File No. ENF-81–2

MEMORANDUM OPINION AND ORDER

(Adopted December 3, 1982; Released December 13, 1982)

BY THE COMMISSION

1. Before us is an application for review filed April 7, 1982 of a Common Carrier Bureau Memorandum Opinion and Order, released March 5, 1982 (MO&O), which denied reconsideration of a March 5, 1981, forfeiture order. The forfeiture was imposed on TransNational Network, Inc. (TNI) for failure to respond to Commission inquiries regarding informal complaints against it, as required by §1.717 of the Commission's Rules, 47 C.F.R. §1.717. For the reasons stated below, we affirm the Bureau's action and deny the application for review. However, we are reducing the forfeiture, *sua sponte*, because we believe the public interest would be better served in so doing.

BACKGROUND

2. TNI is a resale common carrier located in Dallas, Texas. Informal complaints filed against TNI alleged, *inter alia*, that TNI violated its tariff by failing to provide service to several cities and by refusing to refund complainants' deposits when requested to do so. TNI failed to respond to 16 separate Commission inquiries and to a warning letter which stated that continued failure to respond would result in initiation of appropriate proceedings. A notice of apparent liability in the amount of $8,000 was issued on March 5, 1981.

3. TNI did respond to the notice of apparent liability. It stated

that the failure to answer prior inquiries resulted from loss of underlying communications service from other carriers, loss of its lease, misplaced and misdirected mail, problems with a marketing agent, and temporary loss of services of its outside counsel due to medical problems. Finding that the reasons cited by TNI did not excuse its failure to comply with the minimal response requirements of §1.717 of our Rules, 47 CFR 1.717, the Common Carrier Bureau issued a forfeiture order against TNI for the full $8,000. *TransNational Network, Inc.*, ENF 81–2, (released September 29, 1981). TNI subsequently filed a petition for reconsideration, contending that the Bureau did not fully consider the circumstances surrounding TNI's failure to reply to Commission correspondence, and that imposition of the full amount of the forfeiture would financially cripple TNI. The Bureau denied TNI's petition, finding that it had fully considered the circumstances surrounding TNI's failure to respond, and that TNI failed to substantiate its claim of financial hardship.

4. TNI's application for review reiterates the arguments made in its petition for reconsideration. On May 17, 1982, TNI filed for relief under chapter 11 of the Bankruptcy Act, 11 U.S.C. §1100 *et seq.*[1]

DISCUSSION

5. Where a petition for reconsideration has been denied pursuant to delegated authority, our Rules provide that the aggrieved party may file an application for review which will be acted upon by the Commission. *See* 47 C.F.R. §1.115.[2] TNI's application for review does not allege any facts or errors of law which would provide a basis for overturning the Bureau's ruling. It merely reiterates arguments which were previously considered and rejected, and does not specify any basis for reversal. Therefore, its application for review must be denied.

6. Nevertheless, TNI's subsequent bankruptcy filing does lend support to its claim of financial hardship. In view of this development, we believe that the public interest would be better served by reduction of the forfeiture to a nominal amount. We have, therefore, decided, *sua sponte,* to reduce the forfeiture from $8,000 to $100. We take this action in the belief that creditors may be more fully compensated by TNI from its limited assets than would be the case if it were required to pay the outstanding forfeiture.

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[1] Case No. 382–00624G, *TransNational Network, Inc.*, Petition filed May 17, 1982, United States Bankruptcy Court, N.D. Texas.

[2] An Application for Review must specify with particularity that the action taken by the delegated authority conflicts with statute, regulation, case precedent or Commission policy, that it involves a question of law or policy not previously resolved by the Commission, that the precedent upon which it is based should be overturned or revised, or that an erroneous finding of fact or prejudicial procedural error was committed. See 47 C.F.R. §1.115(b)(2).

7. Accordingly, IT IS ORDERED, That the Application for Review filed by Transnational Network, Inc. IS DENIED.

8. IT IS FURTHER ORDERED, that the forfeiture outstanding against TNI of $8,000 is hereby reduced to $100. TNI is directed to advise its trustee in Bankruptcy and the Bankruptcy Court of our action within 20 days of the release date of this Order.

FEDERAL COMMUNICATIONS COMMISSION,
WILLIAM J. TRICARICO, *Secretary.*